

EDITOR'S NOTE

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. 85-224-CFX  
atus: GRANTED

Title: City of Riverside, et al., Petitioners  
v.  
Santos Rivera, et al.

cketed:  
ugust 9, 1985

Court: United States Court of Appeals  
for the Ninth Circuit

Counsel for petitioner: Kotler, Jonathan

Counsel for respondent: Lopez, Gerald P.

try	Date	Note	Proceedings and Orders
1	Aug 9 1985	G	Petition for writ of certiorari filed.
2	Aug 9 1985		Application for stay of mandate filed.
3	Aug 9 1985		Response requested. Due Aug. 14, 1985 at COB.
4	Aug 15 1985		Respondents' memorandum in opposition filed.
5	Aug 15 1985		Temporarily granted by Rehnquist, J.
8	Aug 23 1985		Above application granted by Rehnquist, J., w/memorandum opinion.
0	Aug 29 1985		Order extending time to file response to petition until September 27, 1985.
1	Sep 25 1985		Brief of respondents Santos Rivera, et al. in opposition filed.
2	Oct 2 1985		DISTRIBUTED. October 18, 1985
3	Oct 15 1985	X	Reply brief of petitioners Riverside, et al. filed.
4	Oct 21 1985		Petition GRANTED.
			*****
6	Nov 21 1985		Order extending time to file brief of petitioner on the merits until December 16, 1985.
7	Nov 30 1985		Brief amicus curiae of Americans for Effective Law Enforcement, et al. filed.
8	Dec 13 1985		Order further extending time to file brief of petitioner on the merits until December 18, 1985.
9	Dec 12 1985		Record filed.
0	Dec 12 1985		Certified copy of C. A. proceedings and 1 volume of excerpts received.
1	Dec 16 1985		Brief amicus curiae of Equal Employment Advisory Counsel filed.
2	Dec 16 1985		Brief amicus curiae of Congressmen Thomas J. Bliley, Jr., et al. filed.
3	Dec 16 1985		Brief of petitioners Riverside, et al. filed.
4	Dec 16 1985		Joint appendix filed.
5	Dec 19 1985		Brief amicus curiae of United States filed.
7	Jan 7 1986		Order extending time to file brief of respondent on the merits until January 31, 1986.
8	Jan 31 1986		Brief amicus curiae of Washington Council of Lawyers, et al. filed.
9	Jan 31 1986		Brief of respondent Santos Rivera filed.
0	Feb 4 1986		SET FOR ARGUMENT, Monday, March 31, 1986. (4th case)
1	Jan 31 1986		Brief amicus curiae of NAACP Legal Defense & Educational Fund filed.
2	Feb 21 1986		CIRCULATED.
3	Mar 6 1986	X	Reply brief of petitioners Riverside, et al. filed.
5	Mar 31 1986		ARGUED.

85-224 ①

Supreme Court, U.S.

FILED

AUG 9 1985

JOSEPH F. SPANIOLO, JR.  
CLERK

No. \_\_\_\_\_

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CITY OF RIVERSIDE, LINFORD L.  
RICHARDSON, MICHAEL S. WATTS,  
DAN PETERS, GERALD MILLER, and  
ROBERT PLAIT,  
Petitioners,

vs.

SANTOS RIVERA, JENNIE RIVERA,  
DONALD RIVERA, JEROME RIVERA,  
LEE ROY RIVERA, MARK LARABEE,  
ENRIQUE FLORES, and MANUAL  
FLORES, JR.,  
Respondents.

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

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Petitioners

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QUESTIONS PRESENTED FOR REVIEW:

What are the proper standards within which a district court may exercise its discretion in awarding attorney's fees to prevailing parties under Section 1988 of Title 42 of the United States Code.

## PARTIES INVOLVED

The following parties have an interest in the outcome of this case:

SANTOS RIVERA, JENNIE RIVERA,  
DONALD RIVERA, JEROME RIVERA, LEE ROY  
RIVERA, MARK LARABEE, ENRIQUE FLORES,  
MANUAL FLORES, JR., Plaintiffs and  
Respondents;

ROY B. CAZARES, GERALD LOPEZ,  
Attorneys at Law;

CITY OF RIVERSIDE, LINFORD L.  
RICHARDSON, MICHAEL S. WATTS, DAN  
PETERS, GERALD MILLER, ROBERT PLAIT,  
Defendants and Petitioners.

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No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1985

CITY OF RIVERSIDE, LINFORD L.  
RICHARDSON, MICHAEL S. WATTS,  
DAN PETERS, GERALD MILLER, and  
ROBERT PLAIT

Petitioners,

vs.

SANTOS RIVERA, JENNIE RIVERA,  
DONALD RIVERA, JEROME RIVERA,  
LEE ROY RIVERA, MARK LARABEE,  
ENRIQUE FLORES, and MANUAL  
FLORES, JR.,

Respondents.

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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To the Honorable, the Chief Justice and  
Associate Justices of the Supreme Court  
of the United States:

The City of Riverside, Linford L. Richardson, Michael S. Watts, Dan Peters, Gerald Miller, and Robert Plait, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above case on June 27, 1985.

#### OPINIONS BELOW

The June 27, 1985, opinion of the United States Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed, is printed in a separate Appendix to this Petition at pages 1-1 through 1-12 thereof. No rehearing was sought. The prior opinion of the United States District Court for

the Central District of California, also unreported, (as evidenced by its Findings of Fact and Conclusions of Law and Order, respectively), is likewise printed in the Appendix, at pages 2-1 through 2-13 and 3-1 through 3-3 thereof.

Furthermore, the award of attorneys fees which is the genesis of the instant Petition, was previously vacated by this Honorable Court after the granting of a Petition for Certiorari on May 31, 1983, and which is reported at 461 U.S. 952, 103 S.Ct. 2421. That prior Petition for Certiorari was taken from a judgment of the United States Court of Appeals for the Ninth Circuit, whose opinion therein is reported at 679 F.2d 795, and which, itself, arose from a judgment of the United States District Court for the



Central District of California, unreported, (as evidenced by its Findings of Fact and Conclusions of Law, and Judgment, respectively), entered on April 7, 1981. These prior opinions and actions also also reprinted in the Appendix herein, at pages 4-1 through 4-2, 5-1 through 5-17, 6-1 through 6-6, and 7-1 through 7-13 thereof.

#### JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1985. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

#### QUESTIONS PRESENTED

What are the proper standards within

which a district court may exercise its discretion in awarding attorneys fees to prevailing parties under Section 1988 of Title 42 of the United States Code.

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

This case involves Section 1988 of Title 42 of the United States Code, which, at the time of trial herein, provided, in part, as follows:

". . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The said statute was amended, ef-

fective October 1, 1981. The amendment, however, does not affect this case. (Full text in Appendix 16)

#### STATEMENT OF THE CASE

This suit was filed by eight individuals on June 4, 1976, against 32 defendants, including various police officers, the City of Riverside, and the chief of police of the Riverside Police Department. The complaint alleged the following: violation of the United States Constitution, and specifically the First, Fourth, Fifth, and Fourteenth Amendments thereof, violations of 42 USC 1981, 42 USC 1983, 42 USC 1985 (3), 42 USC 1986, and 42 USC 1988, as well as pendent state claims for conspiracy, emotional distress, assault and battery,

bodily injury, property damage, breaking and entering a residence, malicious prosecution, defamation, false arrest and imprisonment, lost wages, negligence, attorney's fees, and a request for injunctive and declaratory relief. In sum, eight plaintiffs presented separate claims against 32 defendants, for a total of 256 individual claims.

However, 17 of these defendants were dismissed by the original trial judge after vigorously contested motions for summary judgment in January, 1978. (see Memorandum Opinion and Order and Judgment, as printed in the Appendix, at pages 8-1 through 8-14 thereof) Five of the remaining six defendants who moved for and were denied summary judgment (despite opposition thereto from plaintiffs/re-

spondents) were found after trial to have no liability to any of the plaintiffs/respondents whatsoever.

Trial of this matter took place on September 16, 1980, before a jury and a judge who had replaced the first trial judge herein in November, 1978. After deliberating from September 26, 1980 until October 7, 1980, the jury awarded recovery to plaintiffs/respondents on only three of the originally asserted 22 claims, and found only five individuals, in addition to the city, to have any culpability to any of the plaintiffs/respondents whatsoever.

Thus, only six of the original 32 defendants (19%) had verdicts rendered against them by the jury, and these, on only three of the originally asserted claims (14%). The total sum awarded on

all three claims against the six defendants found culpable was \$33,350. No single defendant achieved a jury award in excess of \$8,500. (See Judgment of the District Court, at pages 7-1 through 7-13 of the Appendix) No restraining orders issued as a result of this litigation.

On December 5, 1980, plaintiffs' counsel filed their motion for attorneys fees. On April 3, 1981, the trial court awarded to plaintiffs'/respondents' attorneys the sum of \$245,456.25, representing to the penny the amount of attorneys fees which they requested, and at the rate they requested it, less their out of pocket expenses, and without a multiplier, also requested. Findings of Fact and Conclusions of Law were entered by the trial court on

April 7, 1981, a copy of which is reprinted in the Appendix hereto at pages 6-1 through 6-6 thereof.

On April 24, 1981, petitioners filed their Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from that portion of the final judgment entered in this case on April 7, 1981, as aforesaid. On June 15, 1982, the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the United States District Court for the Central District of California, a copy of the Court of Appeals' opinion, which is reported at 679 F.2d 795, being reprinted at pages 5-1 through 5-17 of the Appendix hereto.

Thereafter, petitioners filed a timely Petition for Certiorari with this Honorable Court, which Petition was



subsequently granted on May 31, 1983, when the award of attorneys fees below was also vacated. The granting of the Petition for Certiorari and the vacation of the award of attorneys fees is reported in 461 U.S. 952, 103 S.Ct. 2421, and is reprinted in the Appendix at pages 4-1 through 4-2 thereof.

After remand to the Ninth Circuit for further consideration in light of Hensley v. Eckerhart, 461 U.S. 424, 103. S.Ct. 1933 (1983), the United States Court of Appeals for the Ninth Circuit vacated its prior order of June 15, 1982, and remanded the issue of attorneys fees to the United States District Court for the Central District of California for further reconsideration in light of the Hensley decision, *supra*.

On July 30, 1984, the said District Court reinstituted its previous award of attorneys fees in the exact same amount as was the subject of the first appeal therefrom, in the sum of \$245,456.25. (See Appendix, pages 2-1 through 2-13, and pages 3-1 through 3-3 .) Thereafter, Petitioners appealed the re-institution of the award of attorneys fees to the United States Court of Appeals for the Ninth Circuit, where, the same three judge panel which had affirmed the trial court's award of attorneys fees in 1982, did so again, on June 27, 1985. (See pages 1-1 through 1-12 of the Appendix hereto.)

#### THE EVIDENCE



Having been successful on only three of their originally asserted 22 claims against only six of the original 32 defendants, for a total jury recovery of \$33,350 in damages, respondents' attorneys filed a "Motion for Reasonable Attorneys Fees and Costs" in the trial court on December 1, 1980 (Appendix, pages 9-1 through 9-105).

The said motion consisted of points and authorities and an affidavit from each of the two respondents' attorneys. The motion made no reference to the customary hourly rate of either of these attorneys, nor did it state that the hours submitted were taken from time records prepared contemporaneously with the rendering of the services to which they were attributed. Indeed, no evidence was ever submitted to the

District Court on either of these points.

Furthermore, the time records submitted by respondents' attorneys did not segregate their time between that spent actually litigating and time not so spent (e.g., travel time, of which there was in excess of 110 hours for one of the attorneys alone). The time records also did not distinguish between time spent prior to the commencement of the litigation and services rendered subsequent thereto, and were, in addition, rife with duplicative time spent by the two attorneys without any explanation therefore.

All time submitted by respondents' attorneys was sought to be recompensed at the same hourly rate--\$125.00 per

hour.

On January 7, 1981, the attorneys for petitioners filed their response to the aforesaid motion for attorneys fees (Appendix, pages 10-1 through 10-140), which response pointed out, inter alia, that the compilation of hours prepared by one of appellees' attorneys (Gerald Lopez) did not itemize his time by date, amount of time spent, or services rendered, but, rather, merely presented the total number of hours spent during each month of his representation, without further explanation.

On or about January 8, 1981, the respondents filed an affidavit prepared by a non-involved attorney (Robert L. Winslow) in support of their motion for attorneys fees (Appendix, pages 11-1 through 11-8). The affidavit set forth

what Mr. Winslow believed to be the present value of the services rendered by respondents' attorneys. However, the affidavit did not state that Mr. Winslow personally knew either of respondents' attorneys or that he had ever seen any of their work. Furthermore, the said affidavit set forth Mr. Winslow's expertise in areas specifically other than civil rights litigation. This affidavit was the only affidavit in support of attorneys fees filed by respondents, other than their own. At no time was the District Court ever informed of respondents' attorneys normal hourly billing rate.

On or about January 8, 1981, Gerald Lopez, one of the attorneys for respondents, filed a "Supplemental Affidavit" in support of his request for attorneys

fees, itemizing for the first time his asserted time and services (Appendix, pages 12-1 through 12-57). However, the said affidavit was silent both on the matter of whether or not this itemization was prepared from contemporaneously kept time records, as well as on the source of this information.

On January 14, 1981, petitioners filed their "Supplemental Memorandum of Points and Authorities in Response to Plaintiffs' Motion for Attorneys Fees" (Appendix, pages 13-1 through 13-12), which raised to the trial court all of the asserted infirmities of respondents' moving papers, as set forth in the paragraphs immediately preceding herein.

No other evidence was ever submitted to or considered by the District

Court in making its award of attorneys fees, either in 1981, which was the subject of the first appeal in the instant matter, or in 1984, which is the subject of the within Petition for Certiorari.

#### THE RULINGS BELOW

On April 3, 1981, the District Court awarded to respondents' counsel attorneys fees in the sum of \$245,456.25, which represented to the penny attorneys fees at the requested rate of \$125.00 per hour for every minute of time submitted by respondents' attorneys to the trial court.

In making its award, the District Court made no reduction in the amount of attorneys fees assessed to reflect:

(1) Duplicated time between the two attorneys (as disclosed by their own submitted itemization of hours);

(2) Travel time;

(3) Pre-litigation time;

(4) Non-litigation time;

(5) Time spent litigating unsuccessful claims; or

(6) The lack of contemporaneously kept and prepared time records.

The District Court specifically did not reflect in its Findings of Fact and Conclusions of Law (Appendix, pages 6-1 through 6-6) that it had considered any of the arguments raised by petitioners in their aforesaid documents filed in opposition to the request for attorneys fees, or even hint that it had considered any factors relevant under the standard authorities in the award of at-



torneys fees.

Indeed, among the things apparently not considered by the District Court in awarding attorneys fees herein (since the record was silent in that regard) were the following factors:

(1) The preclusion of other employment by the attorney due to the acceptance of the case;

(2) Whether the fee was fixed or contingent;

(3) The time limitations imposed by the client or the case;

(4) The amount involved and the results obtained;

(5) The nature and length of the professional relationship with the client; and

(6) Awards in similar cases.

However, and despite a total lack



of any evidence before it, the District Court did make findings regarding:

(1) The customary fee in such litigation;

(2) The experience and reputation of the attorneys involved; and

(3) The undesirability of the case.

In their appeal to the United States Court of Appeals for the Ninth Circuit, all of the above recited shortcomings were raised by petitioners herein. Nevertheless, in affirming the District Court's judgment, the Ninth Circuit (in its Opinion, which appears at pages 5-1 through 5-17 of the Appendix), said that the trial court did not have to discuss any one or all of the twelve factors which it had previously required to be discussed as a pre-con-

dition before an award of attorneys fees could be made by trial courts in the circuit under 42 USC §1988.

Those factors were originally set forth in Johnson v. Georgia Highway Express, 488 F.2d 714, 719 (5th Cir. 1974), which was specifically adopted by the Ninth Circuit in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975). They are:

- (1) The time and labor required;
- (2) The novelty and difficulty of the questions;
- (3) The skill requisite to perform the legal services properly;
- (4) The preclusion of other employment due to the acceptance of the case;
- (5) The customary fee;
- (6) The contingent or fixed nature

of the fee;

(7) The time limitations imposed by the client or the case;

(8) The amount involved and the results obtained;

(9) The experience, reputation, and ability of the attorneys;

(10) The undesirability of the case;

(11) The nature of the professional relationship with the client; and

(12) Awards in similar cases.

Rather, the Ninth Circuit held that while both Johnson and Kerr, *supra*, remained the law of the circuit, that the District Court had met its burden under the aforesaid decisions by discussing only a few of the determining factors which the opinions in both Johnson and Kerr, *supra*, said should be discussed in

order to come to a proper (and reviewable) decision regarding the award of attorneys fees.

Petitioners sought review by the Supreme Court of the Ninth Circuit's judgment by filing a Petition for Certiorari on July 29, 1982. Subsequent thereto, the Supreme Court issued its opinion in Hensley v. Eckerhart, supra. Thus, on May 31, 1983, the Supreme Court granted certiorari herein, vacated the District Court's award of attorneys fees to respondents, and remanded the case for further consideration in light of its opinion in Hensley.

On June 30, 1984, the District Court issued its Order and Findings of Fact and Conclusions of Law, in which it reinstated, to the penny, the amount of its previous award of attorneys fees

to respondents (Appendix, pages 2-1 through 2-13, and 3-1 through 3-3). In said Findings, the only Kerr and Johnson, supra, factor discussed by the District Court which it did not discuss in its 1981 set of Findings was the amount involved and the results obtained. The other Kerr and Johnson factors not discussed in its Findings in 1981, also went unremarked in its Findings in 1984, including the critical "awards in similar cases."

Furthermore, in its 1984 Findings, as in 1981, the District Court made no reduction in the amount of attorneys fees awarded to reflect:

(1) Duplicated time by the two attorneys (as disclosed by their own submitted itemization of hours);

(2) Travel time;

- (3) Pre-litigation time;
- (4) Non-litigation time;
- (5) Time spent litigating unsuccessful claims (although Finding number seven specifically addressed this issue); or
- (6) The lack of contemporaneously kept and prepared time records.

In practically all respects, therefore, the District Court's Findings, Conclusions, and Order of 1984, mirrored its Findings, Conclusions, and Order in 1981. The principal difference was that the 1984 Findings and Conclusions were longer.

After petitioners filed their Notice of Appeal to the Ninth Circuit from the District Court's decision, on August 23, 1984, respondents filed a motion to have the appeal considered by the same

panel of judges who had ruled on the first appeal, the denial of which led to the Supreme Court's grant of certiorari in 1983, as aforesaid. Respondents' motion was granted.

Thus, on June 27, 1985, the Ninth Circuit again affirmed the District Court's award of attorneys fees, and, in its Opinion (Appendix, pages 1-1 through 1-12), made no mention whatsoever of the most critical issues raised by petitioners in their appeal.

This is not to say that the Ninth Circuit specifically rejected these contentions. They simply did not deal with any of them.

Among the things the Ninth Circuit did not discuss was the District Court's refusal to reduce its fee award for duplicated time, non-litigation time, travel time, pre-litigation time, or the



lack of contemporaneously kept time records.

More importantly to petitioners, however, was the Ninth Circuit's failure to mention the single most critical issue of which review was sought, to wit: the District Court's consistently taken posture that it was going to award to respondents attorneys fees for every hour they submitted, period. Nothing petitioners could raise by way of law or fact or evidence to the contrary could ever sway the District Court from this position.

This was the District Court's mind-set from a time even prior to any motion for attorneys fees having been filed, and it was a mind-set that remained constant, even after remand by the Supreme Court. It was a mind-set not uncovered



by inference, however, but, rather, by doing no more than listening to the District Court's own words, and observing its subsequent deeds.

Indeed, it was this oft-announced position of the District Court that petitioners maintained constituted an abuse of the trial court's admittedly broad discretion in the awarding of attorneys fees. Yet, the Ninth Circuit omitted this point as if it were never raised, rather than its comprising the keystone of petitioner's appeal.

## REASONS FOR GRANTING THE WRIT

### I

Certiorari Should Be Granted Because The Trial Court Abused Its Discretion In Not Following the Hensley Guidelines

When the Supreme Court vacated the District Court's award of attorneys fees in May, 1983, and remanded this matter to be reconsidered in light of its then recent decision in Hensley v. Eckerhart, supra, it must have intended that the District Court would follow the guidelines set forth therein.

However, the District Court, in twice making awards of attorneys fees in contravention of existing authority, has clearly shown that it has no intention of being bound by the decisions of the Supreme Court, nor by years of case law. Indeed, the District Court very early on stated clearly and succinctly that what it intended to do herein had nothing whatsoever to do with existing law. Rather, it was always the intention of the District Court to reward counsel for

respondents for what it considered to be a job well done, the facts, and the amount of the jury award, notwithstanding.

The vehicle for this reward was to be a massive judgment of attorneys fees. The formula for same was to be an order that petitioners be assessed as attorneys fees everything requested by respondents. Indeed, the trial court so stated on October 7, 1980, when it told respondents' counsel, Roy Cazares, that:

. . . All you have to do is submit to the Court what your hours are.

(R.T., Vol. A, Appendix 14, page 14-5).

Then, in a comment to petitioners' counsel, the trial judge, who had only presided over the case for less than

50% of its existence, and only after all of the discovery, law and motion, and summary judgment motions (in which 17 of the originally sued 32 defendants had been dismissed) had taken place in front of the original District Court judge, said:

Now, the only thing I tell you, Mr. Kotler, is that he is going to get substantial attorneys fees because that is a lot of time we are talking about.

(R.T., Vol. A, Appendix 14, page 14-7)

Then, after having glossed over the fact that since there was, as of that moment, no way in which the matter of the amount of time spent by respondents' counsel could have been known by this trial judge, the District Court let all present know exactly what its intention

was--and this, many weeks before any motion for attorneys fees was filed:

My disposition now, so that you will be aware of it, is that I would give Mr. Cazares the attorneys fees that cover everything he did that's legitimate so that the burden of the attorneys fees does not fall on the parties. . . And the final thing I say is that I have no quarrel with the quality of what he did. So if I have no quarrel with the quality and he gives me the hours, I will compensate them. And you will have to tell me the rate.

(R.T., Vol. A, Appendix 14, pages 14-7 through 14-9)

Everything that has happened subsequently herein has as its genesis the District Court's expressed desire of October 7, 1980, to reward respondents

for everything they did "that's legitimate," based on their doing little other than providing to the District Court a compilation of hours upon which to compute a predetermined result of massive attorneys fees.

Nothing was to dissuade the District Court from this result, including a remand by the United States Supreme Court. Indeed, the trial court appeared to view the remand that this case be considered in light of Hensley, supra, as a personal affront.

As such, at the hearing on the spreading of the mandate from the Ninth Circuit on October 24, 1983, and with not even a reference to the insufficiency of respondents' fee request, the District Court made it clear that regardless of what the Supreme Court did, and

regardless of the state of the evidence, that it would be doing nothing other than reinstating its previously vacated fee award, in the exact same amount, while tailoring new findings to fit this preconceived result.

It would not require more complete affidavits from respondents' attorneys. It would not make a search of the record before it to weed out duplicative and excessive hours, or to separate claims against individuals against whom respondents brought suit and against whom they failed, from those few defendants against whom they succeeded. Rather, the District Court announced at that time and place that:

. . . [t]he United States Supreme Court is not saying, and the Ninth Circuit is not saying, in sending the



matter back, that the award is wrong or not supported. It merely wants the court to give it some more findings. . . I tell you now that I will not change the award. I will simply go back and be more specific about it.

(R.T., Vol. B, Appendix 15, pages 15-4 through 15-5; page 15-14)

However, it is urged herein by petitioners that the United States Supreme Court was in fact saying that the original award of attorneys fees was not supported, or at least that it could not tell whether or not it was supported, since the trial court failed to make adequate findings with respect to the state of the evidence before it. It is likewise urged that what was called for by the remand was much more than the



mere tailoring of findings to fit a conclusion. The illusion of justice was not involved in the order of remand; justice was. For its part, however, the District Court continued to let it be known that as far as it was concerned, the illusion sufficed. Such conduct--its words and subsequent deeds which fully supported the words--amounted to a clear abuse of the District Court's discretion.

A. Under Hensley, the abuse of a trial court's discretion is a proper ground for the reversal of an award of attorneys fees

As the Supreme Court recognized in Hensley, supra, while a trial court has wide discretion in making an award of

attorneys fees under 42 USC §1988, that discretion is not wholly unfettered, and must be exercised in light of the guidelines expressed therein.

There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making the equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

Hensley v. Eckerhart,  
supra, 461 U.S. at 436-  
437, 103 S.Ct. at 1941

It is no coincidence that the first of these "guidelines" to be discussed immediately following the above quotation in Hensley, supra, was that called

"billing judgment" by the Supreme Court, which earlier therein had stated:

The district court should exclude from this initial fee calculation hours that were not "reasonably expended." (citations) Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obliged to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client are not properly billed to one's adversary pursuant to statutory authority."

Hensley v. Eckerhart,

supra, 461 U.S. at 434,  
103 S.Ct. at 1939-1940,  
quoting from Copeland  
v. Marshall, 641 F.2d  
880, 891 (D.C. Cir.  
1980) (emphasis in  
original)

With respect to the instant matter,  
the respondents' own time records which  
were included in their motion for attor-  
neys fees disclosed the following:

1. Prelitigation time: 208.95  
hours, for which they which they were  
awarded \$26,118.75;

2. Travel time (attorney Cazares  
only, as it is impossible to tell from  
attorney Lopez' submitted time records  
how much of his time was spent traveling  
from his original office in San Diego  
to court in Los Angeles, or to visit  
clients in Riverside): 110.05 hours,  
for which they were awarded \$13,756.25.

3. Conversations between the two

attorneys: 197 hours, for which they were awarded \$24,625.00;

4. "Notes for Cazares" (apparently, notes made by attorney Lopez for his co-counsel Cazares): 45.5 hours, for which they were awarded \$5,687.50;

5. Preparation of a Pre-Trial Order (by Mr. Lopez): 143 hours, for which they were awarded \$17,875.00;

6. Preparation of Jury Instructions (which were subsequently mostly thrown out by the trial court): 59 hours, for which they were awarded \$7,375.00;

7. And perhaps, the most outrageous entry of all--"Stand-by Time" (that is, time spent by Mr. Cazares, who was then based in San Diego, to wait for a jury verdict to be rendered in Los Angeles. During this time, his co-counsel

Mr. Lopez was employed in Los Angeles, no more than 40 minutes driving time from the courthouse. Mr. Lopez submitted no time for "standing by".): 45.50 hours, for which they were awarded \$5,687.50.

All told, the foregoing represents a total of 836.95 hours, for which respondents' attorneys were awarded attorneys fees by the District Court at the requested, non-discounted rate of \$125.-00 per hour, for a total award for these items alone, of \$104,618.75.

Such a shocking happenstance can only be understood with reference to the District Court's previously quoted promise to respondents' counsel, made prior to the filing of any motion for attorneys fees, that if "he gives me the hours, I will compensate them." Such

conduct by the District Court, hardly follows the admonition by this Court to take steps to insure that proper "biling judgment" is followed, but, in addition, constitutes a clear abuse of discretion.

As the First Circuit recently observed:

The attorney's account of the value of the legal services and the amount of time spent must be scrutinized with care. (citations) The ultimate goal is to award fees "adequate to attract competent counsel but which do not produce windfalls." Hensley, 103 S.Ct. at 1938 n.4 (quoting S. Rep. No. 94-1011, p.6 (1976)).

Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 950 (1st Cir. 1984)

Indeed, since Hensley was decided, other courts--although none of them



located within the Ninth Circuit, which continues to march to its own different drummer where fee awards are concerned --have so ruled.

One of the most thoughtful of these decisions was that contained in the Eleventh Circuit's opinion in the case of Ramos v. Lamm, 713 F.2d 546 (11th Cir. 1983). In that case, many of the same issues involved herein were confronted by the court.

On the matter of "hard" (litigation) time, as opposed to "raw" (or non-litigation time, such as travel time), the Eleventh Circuit said:

The district court must determine not just the actual hours expended by counsel, but which of these hours were reasonably expended in litigation. When scrutinizing the actual hours reported,



the district court should distinguish "raw" time from "hard" or "billable" time to determine the number of hours reasonably expended.

Ramos v. Lamm, 713  
F.2d at 553 (emphasis added)

The court went on to point out that:

Compiling raw totals spent, however, does not complete the inquiry. It does not follow that the amount of time actually expended is the amount of time reasonably expended.

Ramos v. Lamm, 713  
F.2d at 553 (emphasis in the original)

The Eleventh Circuit discussed many of the same things which are at issue herein--and which the Ninth Circuit pointedly ignored. For example, in

the instant case, attorney Lopez (according to his affidavit contained in his fee request) was a virtual novice when the within litigation commenced. He submitted a tally of 143 hours for the preparation of a pretrial order and 59 hours for the preparation of jury instructions. For these efforts he was awarded \$25,250.00 by the District Court (based on 202 hours at \$125.00 per hour). As the Eleventh Circuit noted:

In the instant case, for example, more than 100 hours were spent drafting the complaint. While this expenditure of time may have been reasonable, it demands explanation.<sup>3</sup>

3. . . If the inexperience of counsel requires the unusually large number of hours, the adversary should not be required to pay

more than the normal  
time the task should  
have required.

Ramos v. Lamm, 713  
F.2d at 554

On the matter of duplication of  
services, the Eleventh Circuit said:

Another factor the  
court should examine  
in determining the  
reasonableness of  
hours expended is  
the potential du-  
plication of ser-  
vices. "For exam-  
ple, [if] three at-  
torneys are present  
at a hearing when one  
would suffice, compen-  
sation should be de-  
nied for excess time."  
Copeland v. Marshall,  
641 F.2d at 891. Sim-  
ilarly, if the same  
task is performed by  
more than one lawyer,  
multiple compensation  
should be denied.

Ramos v. Lamm, 713  
F.2d at 554

Further, in language equally ap-  
plicable to respondents' use of an out-

of-town attorney when co-counsel was present locally, the Eleventh Circuit said:

However, because there is no need to employ counsel from outside the area in most cases, we do not think travel expenses for such counsel between their offices and the city in which the litigation is conducted should be reimbursed.

Ramos v. Lamm, 713 F.2d  
at 559

On the matter of duplication of services, the Eleventh Circuit said:

Another factor the court should examine in determining the reasonableness of hours expended is the potential duplication of services. . . . [i]f the same task is performed by more than one lawyer, multiple compensation should be denied.

Ramos v. Lamm, 713  
F.2d at 554

B. Awarding full compensation to respondents based on the inadequate time records of their attorneys amounted to an abuse of discretion

In the Opinion of the Ninth Circuit from which review is sought herein, the Ninth Circuit noted that:

Appellants argue that plaintiffs' counsel spent time on claims unrelated to the successful claims, and that unproductive hours should be excluded from the computation of attorney fees. In the instant case, however, the district court concluded that plaintiffs' attorneys spent no time on claims unrelated to the successful claims.

(Opinion, Appendix 1, page 1-6)

In an earlier, though recent case-- that of White v. City of Richmond, 713

F.2d 458 (9th Cir. 1983)--the Ninth Circuit took pains to point out that the district court therein reduced the submitted time therein by some 31 hours, thereby apparently proving to the Circuit Court that:

In this case, the District Court painstakingly scrutinized the time records kept by appellees' attorneys, which were specifically broken down by hour and task. Furthermore, the court's deduction of questionable hours shows that the burden of proof remained on the prevailing party throughout. We will not assume the attorneys efforts were duplicative or unnecessary where the District Court employed such caution.

White v. City of Richmond, 713 F.2d at 461

Unlike the trial court in White, supra, however, the District Court here-

in accepted the respondents' hours as submitted, not reducing them by one minute. This raises the possibility, if not the likelihood--in view of its expressed intention of reinstating the prior award exactly as before--that no such scrutiny of time records submitted ever occurred.

It is true that the Ninth Circuit, in its Opinion, pointed to a reduction by the District Court of costs in the sum of \$2,112.50 as evidence that:

. . . the district court carefully balanced the appropriate factors in awarding attorneys fees.

(Opinion, footnote 3, Appendix, page 1-12)

But this reduction never occurred!

The \$2,112.50 was for time spent by law clerks used by respondents, and this time was not reduced or deleted by the



6

District Court. It was awarded in full, just as it had been previously, in 1981. Nevertheless, while this explains the discrepancy between the actual amount awarded by the District Court herein (\$245,456.25) and the sum which the Ninth Circuit mistakenly believed had been awarded (\$243,343.75; see Opinion, Appendix 1), it hardly is evidence of any balancing by the District Court.

Putting aside for the moment the fact that the District Court had already announced that it would be reinstating the prior award of attorneys fees in advance of having had the opportunity to review the record (Appendix 14), it is also a fact that the District Court could not have "painstakingly scrutinized" respondents' time records in a fashion sufficient to enable it to award



the sums it did, even if it had been so inclined, which it clearly was not.

The reason for this is that what respondents' attorneys presented to the District Court for review was woefully insufficient under any of the authorities who have spoken on the subject, both pre and post Hensley, supra.

Initially, there was never a word by either of respondents' attorneys as to how their time records were prepared, when they were prepared, or what source material was used to prepare them. These things cannot be assumed, and it is respondents' burden to explain such matters.

Mr. Lopez' first submission, was nothing more than a tabulation of hours, which described neither the activity, matter, or date on which the time for

he sought to be recompensed was performed (Appendix, pages 9-101 through 9-102).

Eventually, both Mr. Lopez and Mr. Cazares filed time records from which it is difficult, if not impossible, to obtain any understanding as to what time was spent by respondents' attorneys on specific claims against specific defendants, including the majority (27 out of the 32 sued) who were eventually found to have no liability to any of the respondents.

Such a happenstance makes any discussion regarding time spent on successful versus unsuccessful claims impossible.

As the First Circuit explained in 1984 when it refused to increase an award of attorneys' fees, following a claim made under 42 USC §1988:

The affidavit submitted by appellant's attorney, however, did not show how much of the time he spent on prevailing issues. We have repeatedly warned that "we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims.

Wojtkowski v. Cade, 725  
F.2d 127, 130 (1st Cir,  
1984)

Then, in language which is equally applicable to the situation herein, the First Circuit commented:

The affidavit here was little more than a tally of hours and tasks relative to the case as a whole. Attorneys who anticipate requesting their fees from the court could be well ad-

vised to maintain detailed, contemporaneous time records that will enable a later determination of the amount of time spent on particular issues. Cf.

Ramos v. Lamm, 713 F.2d at 553 (requiring lawyers seeking a fee award under 42 U.S.C. §1988 to maintain 'meticulous, contemporaneous time records'), New York Association for Retarded

Children v. Carey, 711 F.2d 1136, 1147-48 (2d Cir. 1983) (announcing 'for the future' that 'contemporaneous time records are a prerequisite for attorney's fees in this circuit');

National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (warning that '[a]ttorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records.')

Wojtkowski v. Cade, 725 F.2d at 130-131

In the instant matter, there is

nothing in any of respondents' moving papers to show when their compilations of hours were prepared, and, as stated in the preceding citation, and as the United States Supreme Court noted in Hensley, supra, failure to keep contemporaneous records is ground both for a reduction of a requested fee award as well as reversal of any fee award granted thereon.

In addition, the Supreme Court said that fee applicants

. . . should maintain  
billing time records  
in a manner that will  
enable a reviewing court  
to identify distinct  
claims

Hensley v. Eckerhart,  
461 U.S. at 424, 103  
S.Ct. at 1941 (em-  
phasis added)

As stated above, in this requirement as well, respondents fell far

short of what was required of them, a fact obvious from the state of the record, but ignored and unmentioned by the Ninth Circuit.

### CONCLUSION

If the time records before the District Court were replete with duplicated time, non-litigation time, travel time, and padded time, it is also true that the affidavits submitted with these time records contained nothing to indicate when, how, or from what source documents the time records were prepared. And yet, the District Court awarded to respondents attorneys fees at the requested, non-discounted rate of \$125.00 per hour for every hour they submitted.

Such extraordinary conduct,

flying, as it does, in the face of all existing law (not to mention the instructions from this Court that the prior award herein be reconsidered in light of the guidelines set forth in Hensley, supra), normally would be without any understanding.

Fortunately, however, the District Court has provided its own key to understanding its intentions and subsequent conduct, by announcing, on the day the jury verdicts were delivered, and well in advance of any motion for attorneys fees being made, that:

All you have to do is  
submit to the Court  
what your hours are.

(R.T., Vol. A, Appendix 14, page 14-5)

This invitation was followed up, a few moments later, with a statement that



became even more amazing, given the fact that no motion was as of that time pending before the District Court:

My disposition now, so you will be aware of it, is that I would give Mr. Cazares the attorneys fees that cover everything he did that's legitimate so that the burden of the attorneys fees does not fall on the parties. . . And the final thing I say is that I have no quarrel with the quality of what he did. So if I have no quarrel with the quality and he gives me the hours, I will compensate them. And you will have to tell me the rate.

(R.T., Vol. A, Appendix 14, pages 14-7 through 14-8; and 14-9)

The District Court certainly made good on its word, and even after remand herein, remained unmoved, saying at the



hearing on the spreading of the mandate from the Ninth Circuit that:

[t]he United States Supreme Court is not saying, in sending the matter back, and the Ninth Circuit is not saying, in sending the matter back, that the award is wrong or not supported. It merely wants the court to give it some more findings.

(R.T., Vol. B, Appendix 15, pages 15-4 through 15-5)

In other words, if the Supreme Court wanted "some more findings", more findings it was going to get, including those which could not possibly be made given the state of the record. There was to be no ". . . further consideration in light of Hensley v. Eckerhart . . ." (Appendix 4).

But then, the District Court was quite straightforward regarding its lack

of intention of even looking at the record. It had already made up its mind, saying:

I tell you now that I  
will not change the  
award. I will simply  
go back and be more  
specific about it.

(R.T., Vol. B, Appendix  
15, page 15-14)

With these words, the District  
Court made the previous remand by the  
Supreme Court (461 U.S. 952, 103 S.Ct.  
2421) nothing more than an academic  
exercise.

And, of course, that is exactly  
what transpired. No sums of attorneys  
fees were changed in any amount (the  
Ninth Circuit's inexcusable misreading  
of the amount of the judgment to justify  
the unjustifiable conduct of one of  
its district courts notwithstanding).

There were to be no further affidavits. There was to be no explanation of how the respondents' attorneys prepared their time records; nothing explaining what time was spent on which claims against which defendants; nothing explaining when their time records were prepared, or from what source material.

All that happened--as the District Court said it would--was that new findings were tailored to fit an old result.

In the process, the District Court abused its discretion, or, as the Ninth Circuit itself said long ago:

Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court.

Delno v. Market St.  
Ry. Co., 124 F.2d  
965, 967 (9th Cir.  
1942)

Wherefore, petitioners respectfully  
pray that a writ of certiorari be grant-  
ed.

KOTLER & KOTLER

BY: JONATHAN KOTLER

Attorneys for Petitioners

## APPENDIX 1

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SANTOS RIVERA, JENNIE RIVERA, )  
DONALD RIVERA, JEROME RIVERA, )  
LEE ROY RIVERA, MARK LARABEE, )  
ENRIQUE FLORES, MANUAL FLORES, JR., )  
Plaintiffs-Appellees, )  
vs. )  
CITY OF RIVERSIDE, LINFORD L. )  
RICHARDSON, MICHAEL S. WATTS, )  
DAN PETERS, GERALD MILLER, )  
ROBERT PLAIT, )  
Defendants-Appellants. )

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No. 84-6265  
D.C. No. CV 76-1803-MRP

Filed: June 27, 1985  
PHILLIP B. WINBERRY  
Clerk, U. S. Court of Appeals

OPINION

An appeal from the United States  
District Court For the Central  
District of California The Hon.  
Mariana R. Pfaelzer, Judge Pre-  
siding  
Submitted: March 8, 1985\*

\*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 3(f).

Before: HUG, TANG, and PREGERSON,  
Circuit Judges.

PREGERSON, Circuit Judge.

The City of Riverside appeals the district court's award of \$243,343.75 in attorney's fees to plaintiffs under 42 U.S.C. § 1988 (1982). The court awarded fees to plaintiffs because they prevailed on their civil rights claims against defendants.

In the underlying suit, filed in 1976, plaintiffs alleged that Riverside city police officers had violated plaintiffs' Fourth Amendment rights. Following trial in 1980, the jury found for the plaintiffs, and the district court awarded them attorney's

fees. We affirmed the district court in an opinion published at 679 F.2d 795 (9th Cir. 1982), but the Supreme Court vacated and remanded the matter for reconsideration in light of Hensley v. Eckerhart, 461 U.S. 424 (1983). City of Riverside v. Rivera, 461 U.S. 952 (1983). On remand, the district court made comprehensive findings of fact and conclusions of law demonstrating that it had considered the applicable factors necessary to support the reasonableness of the fee award. These factors are enumerated in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976).<sup>1</sup> In July 1984, the district court awarded the plaintiffs' attorney's fees in the same amount as previously awarded.



We find that the district court correctly reconsidered the case in light of Hensley and that the fee award is reasonable. Because the district court did not abuse its discretion in reaching its decision, we affirm.

Reasonable attorney's fees in civil rights cases may be awarded to the prevailing party at the district court's discretion, 42 U.S.C. § 1988 (1982), and we will not disturb the award absent an abuse of discretion. Rutherford v. Pitchess, 713 F.2d 1416, 1420 (9th Cir. 1983) (citing Kerr, 526 F.2d at 69). The plaintiffs are clearly the prevailing parties here. They succeeded on the most significant issue of the litigation--they proved that their civil rights had been

violated by law enforcement officers.

In Hensley, the Supreme Court held that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988." 461 U.S. at 440. The amount awarded must be reasonably related to the results obtained. Id. To demonstrate adequately the relationship between outcome and award, the district court need not specifically discuss each of the twelve "Kerr factors." The court need only explain how the award is reasonably related to the outcome of the proceedings.<sup>2</sup> Id. at 437; Rutherford, 713 F.2d at 1420. The district court in the instant case considered the outcome of the proceedings and sufficiently explained how it took the

outcome into account in fixing fees.

See Hensley, 461 U.S. at 437.

Appellants argue that plaintiffs' counsel spent time on claims unrelated to the successful claims, and that unproductive hours should be excluded from the computation of attorney fees. See id. at 434. In the instant case, however, the district court concluded that plaintiffs' attorneys spent no time on claims unrelated to the successful claims. The record supports the district court's findings that all of the plaintiffs' claims involve a "common core of facts" and that the claims involve related legal theories. Hensley teaches that "[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's

fee reduced simply because the district court did not adopt each contention raised." Id. at 440.

Moreover, "the district court should focus on the significance of the overall relief obtained . . . in relation to the hours reasonably expended on the litigation." Id. at 435. On remand, this relationship is precisely what the district court focused on. The court considered the degree of success in relation to the ultimate award of fees and found a reasonable relationship between the extent of that success and the amount of the award. Because the district court clearly and concisely explained the grounds for its decision, we conclude that it did not abuse its discretion in awarding fees.<sup>3</sup>

Appellants also contend that the

amount of the attorney's fee award is excessive because the amount of damages awarded by the jury, viz., \$33,350, is relatively small in comparison to the attorney's fee award. The legislative history of section 1988 demonstrates that its purpose is to ensure "effective access to the judicial process." Id. at 429 (quoting H. R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976)). The amount of fees awarded should "not be reduced because the rights involved may be non-pecuniary in nature." Id. at 430 n.4 (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), re-printed in 1976 U.S. Code Cong. & Ad. News 5908, 5913). The legislative history therefore lends no support to the proposition that there need be a relationship between the amount of damages

awarded to the prevailing party and the amount of attorney's fees awarded.

Appellants finally contend that the district court did not review the record to see if the award was justified. This contention is meritless. The district court stated at oral argument in October 1983 that should the appellants be correct in their assertion that the award was not supported by the record, the court would "probably need another hearing." The statement indicated that the court intended to review the record to be sure that its decision was properly supported. The court's extensive findings of fact and conclusions of law indicate that it thoroughly reviewed the record.

In short, the district court correctly applied the necessary criteria

to justify the attorney's fees awarded and explained the reasons for the award clearly and concisely. As required by Hensley, the district court adequately discussed the extent of the plaintiffs' success and its relationship to the amount of the attorney's fees awarded. 461 U.S. at 437. The award is well within the discretion of the district court.

AFFIRMED.

#### FOOTNOTES

1. The twelve Kerr factors are:

- (1) The time and labor required;
- (2) The novelty and difficulty of the questions;
- (3) The skill requisite to perform the legal service properly;
- (4) The preclusion of employment by the attorney due to acceptance of the

case;

- (5) The customary fee;
- (6) Whether the fee is fixed or contingent;
- (7) Time limitations imposed by the client or the circumstances;
- (8) The amount involved and the results obtained;
- (9) The experience, reputation, and ability of the attorneys;
- (10) The undesirability of the case;
- (11) The nature and length of the professional relationship with the client;
- (12) Awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976). These guidelines were initially presented in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), and derive directly from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106.



2. The district court did, in fact, consider most of the Kerr factors specifically in its findings of facts and conclusions of law (i.e., factors 1, 2, 3, 5, 8, 9, 10, and 11). The appellants concede that, under the law of the Ninth Circuit, the district court is not required to respond to each of the factors enumerated.
3. The district court on remand reduced the original request by the amount of costs not contemplated under section 1988 and did not apply the multiplier requested by the appellees. The court stated that perhaps a multiplier should have been applied in light of the exceptional job the prevailing attorneys did, but again failed to do so after considering the case as a whole. Use of a multiplier may be appropriate where "the results obtained . . . represent a significant achievement." White v. City of Richmond, 713 F.2d 458, 461 (9th Cir. 1983). The court's decision not to apply the multiplier is another indication that the district court carefully balanced the appropriate factors in awarding attorneys fees.

## APPENDIX 2

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,                    )  
  )  
      Plaintiffs,                            )  
  )  
      v.                                        )  
  )  
CITY OF RIVERSIDE, et al.,                )  
  )  
      Defendants.                            )  
\_\_\_\_\_

No. CV 76 1803-MRP

Filed: July 26, 1984  
Clerk, U.S. District Court  
Central District of California

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Plaintiffs motion for an award of attorney's fees and costs came on for hearing on October 24, 1983 and June 6, 1984 before the Honorable Mariana R. Pfaelzer, United States District Judge, on remand from the United States Court of Appeals for the Ninth Circuit for

further consideration in light of Hensley v. Eckerhart, \_\_\_ U.S. \_\_\_, 103 S.Ct. 1933 (1983). The Court, having examined and considered plaintiffs' memorandum regarding the hearing on filing and spreading the judgment of the Court of Appeals, having heard and considered oral argument, and having reconsidered the memoranda, affidavits, and exhibits previously filed by the parties, as well as the record as a whole, makes the following Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

—1. Plaintiffs' action presented complex and interrelated issues of fact and law in a civil rights case involving eight individual Chicano plaintiffs, a number of individual police officer defendants, and one municipal

defendant, the City of Riverside.

2. The events upon which this action is predicated took place in the evening on August 1, 1975 when plaintiffs attended a party at a private residence located in Riverside. A large number of unidentified Riverside police officers, acting without a warrant but with tear gas and unnecessary physical force, broke up the party and arrested many of the people attending, including four of the plaintiffs. The party was not creating a disturbance in the community at the time of the break-in. The plaintiffs who were arrested were prosecuted, but the charges were dismissed for lack of probable cause.

3. A number of police officers were involved in the events referred to

in Finding number 2 and at the trial the testimony of the parties and the witnesses was often in conflict as to the role of the individual officers in the events of the evening.

4. Under the circumstances of this case, it was reasonable for plaintiffs initially to name thirty-one individual defendants (thirty police officers and the chief of police) as well as the City of Riverside as defendants in this action. After further investigation and discovery, the Court granted summary judgment in favor of eighteen of the individual defendants and dismissed the claims against them.

5. After four years of discovery and two settlement conferences, both of which were ordered by and took place in the presence of this Court, a

nine-day jury trial ensued. The jury, following seven days of deliberation, found in favor of all eight plaintiffs and against the City of Riverside and four of the individual officers on the \$ 1983, false arrest, false imprisonment and negligence claims. The jury awarded total damages of \$33,350. In the opinion of the Court, the size of the jury award resulted from (a) the general reluctance of jurors to make large awards against police officers, and (b) the dignified restraint which the plaintiffs exercised in describing their injuries to the jury. For example, although some of the actions of the police would clearly have been insulting and humiliating to even the most insensitive person and were, in the opinion of the Court, intentionally

so, plaintiffs did not attempt to play up this aspect of the case.

6. Plaintiffs were the prevailing parties in this action. The central and most important issue in this case was whether there was police misconduct committed by and condoned by defendants. Plaintiffs established this misconduct to the satisfaction of the jury and the Court. With respect to this central issue, plaintiffs were clearly the prevailing parties.

7. All claims made by plaintiffs were based on a common core of facts. The claims on which plaintiffs did not prevail were closely related to the claims on which they did prevail. The time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to



claims on which plaintiffs did prevail.

8. Counsel demonstrated outstanding skill and experience in handling this case.

9. Given the nature of this lawsuit and the type of defense presented, many attorneys in the community would have been reluctant to institute and to continue to prosecute this action.

10. The Court finds the following claimed number of hours to be fair and reasonable:

Attorney Services:

Roy B. Cazares	681.25 hours
Gerald P. Lopez	1,265.50 hours
TOTAL	1,946.75 hours

Law Clerk Services: 84.50 hours

11. Counsel for plaintiffs achieved excellent results for their

clients, and their accomplishment in this case was outstanding. The amount of time expended by counsel in conducting this litigation was reasonable and reflected sound legal judgment under the circumstances.

12. Counsel for plaintiffs also served the public interest by vindicating important constitutional rights. Defendants had engaged in lawless, unconstitutional conduct, and the litigation of plaintiffs' case was necessary to remedy defendants' misconduct. Indeed, the Court was shocked at some of the acts of the police officers in this case and was convinced from the testimony that these acts were motivated by a general hostility to the Chicano community in the area where the incident occurred. The

amount of time expended by plaintiffs' counsel in conducting this litigation was clearly reasonable and necessary to serve the public interest as well as the interests of plaintiffs in the vindication of their constitutional rights.

13. Counsel for plaintiffs base their claimed award of attorney's fees on a rate of \$125.00 per hour. The Court finds this hourly rate typical of the prevailing market rate for similar services by lawyers of comparable skill, experience and reputation within the Central District at the time these services were performed.

14. The rate of \$25.00 per hour, which counsel seeks as compensation for the time expended by two law clerks, was lower than the customary hourly

rate for such services at the time those services were performed.

15. Plaintiffs achieved a level of success in this case that makes the total number of hours expended by counsel a proper basis for making the fee award.

16. Plaintiffs are entitled to attorney's fees in the amount of \$243,343.75 plus \$2,112.50 in fees expended for law clerks. The amount of the total award is \$245,456.25, exclusive of interest.

17. To the extent that any of the Conclusions of Law are deemed to be Findings of Fact, they are incorporated herein.

#### CONCLUSIONS OF LAW

1. To the extent that any Findings of Fact are deemed to be

Conclusions of Law, they are incorporated herein.

2. Plaintiffs are the prevailing parties in this action.

3. Plaintiffs maintained this action in order to secure the vindication of important constitutional rights. A fee award in this civil rights action will therefore advance the public interest.

4. No special circumstances exist which would render an award of attorney's fees unjust.

5. Reasonable charges for services of law clerks may be properly included as part of an award of attorney's fees. Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc., 526 F.2d 1196, 1210 n.19 (9th Cir. 1975), cert. denied, 425 U.S. 959

(1976); Keith v. Volpe, 86 F.R.D. 565, 576 (C.D. Cal. 1980).

6. Plaintiffs seek reimbursement for certain expenditures made by them during the prosecution of this case. As 42 U.S.C. § 1988 does not provide for the reimbursement of such expenses, the Court declines to order their reimbursement.

7. Plaintiffs achieved a level of success in this case that makes the total number of hours expended by counsel a proper basis for the fee award. The amount of the fee awarded is justified in light of the substantial success achieved by plaintiffs. Hensley v. Eckerhart, \_\_\_ U.S. \_\_\_, 103 S.Ct. 1933, 1940-43 (1983); Rutherford v. Pitchess, 713 F.2d 1416, 1421-22 (9th Cir. 1983); White v. City of

Richmond, 713 F.2d 458, 461-62 (9th Cir. 1983); Smiddy v. Varney, 574 F. Supp. 710, 713 (C.D. Cal. 1983).

8. Plaintiffs' counsel are entitled to be compensated at the prevailing market rates within the Central District for similar services by lawyers of comparable skill, experience and reputation at the time. Blum v. Stenson, \_\_\_ U.S. \_\_\_, 104 S.Ct. 1541, 1547 & n.11 (1984); White v. City of Richmond, 713 F.2d at 460-61.

9. Plaintiffs are entitled to an award of attorney's fees in the amount of \$245,456.25 pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

DATED: July 24, 1984

/s/Mariana R. Pfaelzer  
MARIANA R. PFAELZER  
United States District Judge

### APPENDIX 3



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,       )  
                                  )  
      Plaintiffs,               )  
                                  )  
      v.                         )  
                                  )  
CITY OF RIVERSIDE, et al.,   )  
                                  )  
      Defendants.                )  
\_\_\_\_\_  
                                  )

No. CV 76 1803-MRP

Filed: July 26, 1984  
Clerk, U.S. District Court  
Central District of California

ORDER

Plaintiffs' motion for an award of attorney's fees and costs came on for hearing on October 24, 1983 and June 6, 1984 before the Honorable Mariana R. Pfaelzer, United States District Judge, on remand from the United States Court of Appeals for the Ninth Circuit for further consideration

in light of Hensley v. Eckerhart, \_\_\_\_  
U.S.\_\_\_\_, 103 S.Ct. 1933 (1983). Plain-  
tiffs appeared at both hearings by and  
through their counsel, Patrick O. Pat-  
terson. Defendants appeared at both  
hearings by and through their counsel,  
Jonathan Kotler. The Court, having  
considered plaintiffs' memorandum re-  
garding the hearing on filing and  
spreading the judgment of the Court of  
Appeals, having heard oral argument,  
having reconsidered the memoranda,  
affidavits, and exhibits previously  
filed by the parties, as well as the  
record as a whole, and having made and  
filed its written Findings of Fact and  
Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND  
DECREED that plaintiffs' motion for  
reasonable attorney's fees and costs is

hereby granted pursuant to 42 U.S.C.  
§1988. Defendants are ordered to pay  
plaintiffs' reasonable attorney's fees  
in the amount of \$245,456.25.

IT IS FURTHER ORDERED, ADJUDGED  
AND DECREED that defendants' motion  
for attorney's fees and costs is denied.

DATED: July 24, 1984

/s/ Mariana R. Pfaelzer  
MARIANA R. PFAELZER  
United States District Judge

## APPENDIX 4

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1982

CITY OF RIVERSIDE, LINFORD L. )  
RICHARDSON, MICHAEL S. WATTS, )  
DAN PETERS, GERALD MILLER, and )  
ROBERT PLAIT, )

Petitioners, )

vs. )

SANTOS RIVERA, JENNIE RIVERA, )  
DONALD RIVERA, JEROME RIVERA, )  
LEE ROY RIVERA, MARK LARABEE, )  
ENRIQUE FLORES, and MANUAL )  
FLORES, JR., )

Respondents. )

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No. 82-156  
D.C. NO. CV76-1803-MRP

Filed: May 31, 1983

ORDER GRANTING PETITION FOR CERTIORARI  
AND ORDER OF REMAND

Certiorari granted, judgment  
vacated, and case remanded for further

///

consideration in light of Hensley v.  
Eckerhart, ante, p. 424. Reported  
below: 679 F.2d 795.

## APPENDIX 5

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SANTOS RIVERA, JENNIE RIVERA, )  
DONALD RIVERA, JEROME RIVERA, )  
LEE ROY RIVERA, MARK LARABEE, )  
ENRIQUE FLORES, MANUAL FLORES, JR. )

Plaintiffs/Appellees, )

vs. )

CITY OF RIVERSIDE, LINFORD L. )  
RICHARDSON, MICHAEL S. WATTS, )  
DAN PETERS, GERALD MILLER, )  
ROBERT PLAIT, )  
Defendants/Appellants. )

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No. 81-5362  
D.C. No. CV76-1803-MRP

Filed: June 15, 1982  
PHILLIP B. WINBERRY  
Clerk, U.S. Court of Appeals

**OPINION**

Appeal from the United States  
District Court for the Central  
District of California The Honor-  
able Mariana R. Pfaelzer, Presid-  
ing

Argued and Submitted--March 2, 1982

Before: HUG, TANG, AND PREGERSON, Cir-  
cuit Judges.



PREGERSON, Circuit Judge:

42 U.S.C. § 1988 provides: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

This appeal presents the question whether the amount of attorney's fees the district court awarded was reasonable under section 1988 where that amount greatly exceeded the verdict, and where the prevailing party was successful on fewer than all claims against fewer than all defendants.

Plaintiffs/appellees are Mexican-Americans who sought to vindicate their civil rights in a politically unpopular

suit against the City of Riverside, the Riverside police chief, and thirty Riverside police officers.

The events out of which this lawsuit arose took place in August 1975, when appellees attended a party at a private residence in Riverside, California. The police, without a warrant, but with tear-gas and unnecessary physical force, broke up the party and arrested four of the appellees. The charges were dismissed for lack of probable cause.

Appellees sued the thirty-two defendants, alleging civil rights and pendent state tort violations.<sup>1</sup> The court granted summary judgment in favor of eighteen individual defendants and dismissed the claims against them.<sup>2</sup> After four years of discovery and two settlement conferences, a nine day trial

ensued. The jury found in favor of all eight plaintiffs and against the City of Riverside and four of the individual officers on the negligence, false arrest, false imprisonment, and section 1983 claims. The jury awarded appellees total damages of \$33,350.

After the trial, appellees moved for reasonable attorney's fees and costs pursuant to section 1988. The district court granted the motion and awarded \$243,343.75 in attorney's fees (computed at \$125 per hour, the standard rate for attorneys with comparable expertise in the civil rights area) and \$2,112.50 in law clerk's fees (computed at \$25 per hour). <sup>3</sup>

Appellants do not appeal the adverse jury verdict or the court's determination that appellees are entitled to an

attorney's fees award. Appellants do, however, contend that the fee award is excessive.

## DISCUSSION

In 1976, Congress enacted 42 U.S.C. § 1988 and thereby firmly established that successful civil rights plaintiffs may receive reasonable attorney's fees as part of the costs. The amount of reasonable attorney's fees is within the sound discretion of the trial court. **Kerr v. Screen Extras Guild, Inc.**, 526 F.2d 67, 69 (9th Cir. 1975), cert. denied sub nom. Perkins v. Screen Extras Guild, Inc., 425 U.S. 951 (1976). The trial court's determination of a reasonable attorney's fee will not be disturbed absent clear abuse of discretion. Id. See also **Twentieth Century**

**Fox Corp. v. Goldwyn**, 328 F.2d 190, 221 (9th Cir.) cert. denied, 379 U.S. 880 (1964).

In **Kerr**, this court listed twelve factors for the district court to consider in setting attorney's fees awards.<sup>4</sup> The record must "demonstrate that the district court considered the factors established by **Kerr**." **Kessler v. Associates Financial Services Company of Hawaii, Inc.**, 639 F.2d 498, 500 (9th Cir. 1981). The district court, however, need not discuss specifically each of the twelve factors. It is sufficient if the record shows that the court considered the factors "called into question by the case at hand and necessary to support the reasonableness of the fee award." Id. at 500 n.1. (citing **Stanford Daily v. Zurcher**, 64 F.R.D. 680,

682 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9th Cir.), rev'd on other grounds, 436 U.S. 547 (1978)). See also **Manhart v. City of Los Angeles**, 652 F.2d 904, 907 (9th Cir. 1981).

The record here indicates that the court considered, applied, and discussed the Kerr factors necessary to support the award.<sup>5</sup> Having reviewed the record, we are satisfied that the district court did not abuse its discretion in awarding the attorney's fees requested.

Appellants urge this court to reduce the amount awarded because appellees "succeeded" on fewer than all of the original claims against fewer than all of the original thirty-two defendants, **Sethy v. Alameda County Water District**, 602 F.2d 894 (9th Cir. 1979), cert.

denied, 444 U.S. 1046 (1980), and because the attorney's fees were disproportionately larger than the jury verdict. **Schaeffer v. San Diego Yellow Cabs, Inc.**, 462 F.2d 1002 (9th Cir. 1972).

In **Manhart**, we construed **Sethy** and concluded that no attorney's fees "may be paid for the time spent to prepare unrelated claims on which plaintiffs did not prevail." 652 F.2d at 909, citing **Sethy**, 602 F.2d at 898 (emphasis added). We distinguished **Sethy** by pointing out that "plaintiffs [in **Manhart**] pursued several claims to remedy the same injury, gender discrimination." 652 F.2d at 909. In **Manhart**, we concluded that if all claims are related to the same injury, then the amount of attorney's fees should not be reduced for time



spent on unsuccessful claims if plaintiff prevails in the ultimate goal of the lawsuit.

Like **Manhart**, the present case involves related claims brought to remedy the same injury--here, the violation of civil rights. The district court, therefore, properly awarded attorney's fees for hours expended on unsuccessful but related claims. See also **Seattle School District No. 1 v. Washington**, 633 F.2d 1338, 1349-50 (9th Cir. 1980); **Northcross v. Board of Education of the Memphis City Schools**, 611 F.2d 624, 636 (6th Cir 1979), cert. denied, 447 U.S. 911 (1980). This result is in line with Congress' unequivocal viewpoint that civil rights attorneys should be compensated "as is traditional with attorneys compensated by a



fee-paying client for all time reasonable expended on a matter." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976). Traditional methods of attorney compensation based on fee-paying clients do not differentiate between successful and unsuccessful claims. See Northcross, 611 F.2d 636.

In passing section 1988, Congress intended to provide access to the judicial system for those who wish to vindicate civil rights violations. Reducing attorney's fees awards for unsuccessful related claims brought in good faith would militate against that policy and "would hardly further our mandate to use the 'broadest and most flexible remedies available' to us to enforce the civil rights laws if we were so directly to discourage innovative and vigorous law-

ying in a changing area of the law." 6  
**Northcross**, 611 F.2d at 636.

This decision is not affected by **Bartholomew v. Watson**, No. 80-3237, (9th Cir. Jan. 11, 1982), which does not refer to our earlier **Manhart** decision. **Bartholomew** was remanded because the record failed to reflect the standard the district court employed in granting the entire amount of attorney's fees requested by the prevailing party. In the present case, the record reflects that the district court applied the correct standard.

Appellants rely on **Schaeffer v. San Diego Yellow Cabs, Inc.**, 462 F.2d 1002 (9th Cir. 1972), to support their contention that the amount of attorney's fees awarded must be proportionate to the jury verdict. In **Schaeffer**, a Title

VII case, the district court declared invalid certain state laws relating to employee working conditions, refused damages for back pay, and awarded the prevailing party \$600 in attorney's fees. The Ninth Circuit reversed in part, holding that certain issues were moot and that the plaintiff should receive some of the back pay that was denied. We remanded and suggested that the amount of attorney's fees "should be proportionate to the extent to which the plaintiff prevail[ed] in the suit." Id. at 1008 (emphasis added).

Schaeffer does not, as appellants suggest, prohibit an attorney's fees award disproportionate to a jury verdict. The extent to which a plaintiff has "prevailed" is not necessarily reflected in the amount of the jury

verdict. Rather, the legislative history behind section 1988 demonstrates Congress' position that courts should award reasonable attorney's fees even if the rights vindicated are "nonpecuniary in nature . . . ." S. Rep. 94-1011, 94th Cong. 2d Sess. 6 (1976). Schaeffer does not limit the amount of attorney's fees a prevailing party may recover. That decision rests within the discretion of the district court.

We conclude that the district court did not abuse its discretion in awarding the attorney's fees requested by the plaintiffs/appellees.

**AFFIRMED.**

## FOOTNOTES

1. The complaint alleged violations of plaintiffs' civil rights protected by the First, Fourth, and Fourteenth Amendments, and 42 U.S.C. §§ 1981, 1983, 1985(3), and 1986. In connection with said civil rights violations, plaintiffs also alleged related state law claims predicated on conspiracy, infliction of emotional distress, assault and battery, property damage, breaking and entering, malicious prosecution, defamation, false arrest, false imprisonment, lost wages, negligence, and sought damages and declaratory and injunctive relief.
2. The reason why plaintiffs initially sued thirty Riverside police officers was because plaintiffs had great

difficulty learning the identity of the officers actually involved in the incident that gave rise to the action.

3. The court reduced the original request by the amount of costs not contemplated under section 1988 (out-of-pocket office expenses) and did not apply the multiplier requested by appellees.

4. The following twelve factors were established first in **Johnson v. Georgia Highway Express, Inc.**, 488 F.2d 714, 719 (5th Cir. 1974) and adopted by the Ninth Circuit in **Kerr**:

1. The time and labor required;
2. The novelty and difficulty of the questions;
3. The skill requisite to perform

the legal services properly;

4. The preclusion of other employment due to acceptance of the case;

5. The customary fee;

6. The contingent or fixed nature of the fee;

7. The limitations imposed by the client or the case;

8. The amount involved and the results obtained;

9. The experience, reputation, and ability of the attorneys;

10. The undesirability of the case;

11. The nature of the professional relationship with the client;

12. Awards in similar cases.

5. The district court carefully determined that:

1. The action presented complex issues;



2. The amount of time expended was reasonable and reflected sound legal judgment under the circumstances;
3. The attorneys demonstrated skill and experience in handling this protracted civil rights case;
4. The action was maintained to vindicate important constitutional rights and therefore advanced the public interest.
6. This is especially true in the present case. Appellees brought suit in 1975, years before the Supreme Court declared that municipalities could be sued under section 1983. **Monell v. Department of Social Services**, 436 U.S. 658 (1978).



## APPENDIX 6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,                     )  
  )  
                  Plaintiffs,                     )  
  )  
                  v.                                 )  
  )  
CITY OF RIVERSIDE, et al.,                 )  
  )  
                  Defendants.                     )  
\_\_\_\_\_)

CASE NO. CV 76-1803 MRP  
Filed: April 3, 1981  
Clerk, U.S. District Court  
Central District of California

Entered: April 7, 1981  
Clerk, U.S. District Court  
Central District of California

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Plaintiffs' motion for the award of reasonable attorneys' fees and costs came on for hearing on January 19, 1981 before the Honorable Mariana R. Pfaelzer, United States District Judge. The Court, having heard and considered oral

argument and having examined and considered the memoranda, affidavits and exhibits filed by the parties, makes the following Findings of Fact and Conclusions of Law:

### **FINDINGS OF FACT**

1. Plaintiffs' action presented complex issues of law in a case involving eight individual plaintiffs, eleven individual defendants and a municipal defendant.

2. Counsel demonstrated skill and experience in handling this protracted civil rights case.

3. Given the nature of this lawsuit, many attorneys within the community would have been reluctant to institute this action.

4. The Court finds the following claimed number of hours to be fair and reasonable:

Attorney Services

Roy B. Cazares	681.25 hours
Gerald P. Lopez	1,265.50 hours
TOTAL	1,946.75 hours

Law Clerk Services            84.50 hours

5. The amount of time expended by counsel in conducting this litigation is reasonable and reflects sound legal judgment under the circumstances of this case.

6. Counsel for plaintiffs base their claimed award of attorneys' fees on an hourly rate of \$125 per hour. This rate of compensation is typical of the hourly rate earned by attorneys of like experience within this judicial district.

7. The rate of \$25 per hour, which counsel seek as compensation for the time expended by two law clerks, is a reasonable and customary hourly fee.

8. Plaintiffs have incurred reasonable attorneys' fees in the amount of \$243,343.75 plus \$2,112.50 in fees expended for law clerks. The amount of the total award is \$245.456.25.

9. To the extent that any of the Conclusions of Law set forth below are deemed to be Findings of Fact, they are incorporated herein.

#### **CONCLUSIONS OF LAW**

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. To the extent that any of the foregoing Findings of Fact are deemed to

be Conclusions of Law, they are incorporated herein.

2. Plaintiffs maintained this civil action in order to secure the vindication of important constitutional rights. A fee award in the instant civil rights action will therefore advance the public interest.

3. No special circumstances exist which would render an award of attorneys' fees unjust.

4. Reasonable charges for services of law clerks may be properly included as part of an attorneys' fee award. **Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.**, 526 F.2d 1196, 1210 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976); **Keith v. Volpe**, 86 F.R.D. 565, 576 (C.D. Cal. 1980).

5. Plaintiffs seek reimbursement for certain expenditures made by them during the prosecution of this case. As 42 U.S.C. § 1988 does not provide for the reimbursement of such expenses, the Court declines to order their reimbursement.

6. Plaintiffs, as the prevailing party, are entitled to an award of attorneys' fees in the amount of \$245,456.25 as part of the costs pursuant to the Civil Rights Attorney's Fee Act of 1976, 42 U.S.C. § 1988.

7. This award is rendered against defendants in their official capacities.

DATED: March 31, 1981

/ss/ Mariana R. Pfaelzer  
Mariana R. Pfaelzer  
United States District Judge

## APPENDIX 7



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,                     )  
  )  
                  Plaintiffs,                     )  
  )  
                  v.                                 )  
  )  
CITY OF RIVERSIDE, et al.,                 )  
  )  
                  Defendants.                     )  
\_\_\_\_\_)

CASE NO. CV. 76-1803 MRP  
Filed: April 3, 1981  
Clerk, U.S. District Court  
Central District of California

Entered: April 7, 1981  
Clerk, U.S. District Court  
Central District of California

**JUDGMENT**

The above entitled matter came on regularly for trial on September 16, 1980, the Honorable Mariana R. Pfaelzer, United States District Judge, presiding. The jury, having heard the evidence and

argument of counsel, having been instructed and having had the case submitted to them, returned with verdicts.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the following verdicts are entered as part of the judgment:

1. In favor of the plaintiff SANTOS RIVERA and against the defendant LINFORD L. RICHARDSON, for negligence, actual or compensatory damages in the amount of \$50.00;

2. In favor of the plaintiff SANTOS RIVERA and against defendant MICHAEL S. WATTS, for negligence, actual or compensatory damages in the amount of \$50.00;

3. In favor of plaintiff SANTOS RIVERA and against defendant CITY OF RIVERSIDE, for negligence, actual or

compensatory damages in the amount of \$2,400.00;

4. In favor of plaintiff SANTOS RIVERA and against defendant MICHAEL S. WATTS, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$1,000.00, and punitive damages in the amount of \$500.00;

5. In favor of the plaintiff MARK LARRABEE and against defendant CITY OF RIVERSIDE, for negligence, actual or compensatory damages in the amount of \$500.00;

6. In favor of the plaintiff MARK LARRABEE and against defendant MICHAEL S. WATTS, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$50.00; and punitive damages in the amount of \$100.00;

7. In favor of the plaintiff MARK LARRABEE and against defendant LINFORD L. RICHARDSON, for negligence, actual or compensatory damages in the amount of \$25.00;

8. In favor of the plaintiff MARK LARRABEE and against the defendant MICHAEL S. WATTS, for negligence, actual or compensator damages in the amount of \$25.00.

9. In favor of the plaintiff DONALD RIVERA and against the defendant MICHAEL S. WATTS, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$50.00, and punitive damages in the amount of \$100.00;

10. In favor of the plaintiff JENNIE RIVERA and against the defendant CITY OF RIVERSIDE, for negligence, actual or

compensatory damages in the amount of \$2,900.00;

11. In favor of the plaintiff JENNIE RIVERA and against the defendant MICHAEL S. WATTS, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$1,000.00, and punitive damages in the amount of \$500.00;

12. In favor of the plaintiff JENNIE RIVERA and against the defendant MICHAEL S. WATTS, for negligence, actual or compensatory damages in the amount of \$50.00;

13. In favor of the plaintiff JENNIE RIVERA and against the defendant LINFORD L. RICHARDSON, for negligence, actual or compensatory damages in the amount of \$50.00;

14. In favor of the plaintiff DONALD RIVERA and against the defendant LINFORD

L. RICHARDSON, for negligence, actual or compensatory damages in the amount of \$25.00;

15. In favor of the plaintiff DONALD RIVERA and against the defendant MICHAEL S. WATTS, for negligence, actual or compensatory damages in the amount of \$25.00;

16. In favor of plaintiff DONALD RIVERA and against the defendant CITY OF RIVERSIDE, for negligence, actual or compensatory damages in the amount of \$500.00;

17. In favor of plaintiff LEE ROY RIVERA and against the defendant CITY OF RIVERSIDE, for false arrest/false imprisonment, actual or compensatory damages in the amount of \$3,000.00;

18. In favor of the plaintiff LEE ROY RIVERA and against the defendant DAN

PETERS, for false arrest/false imprisonment, actual or compensatory damages in the amount of \$250.00;

19. In favor of the plaintiff LEE ROY RIVERA and against the defendant CITY OF RIVERSIDE, for violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$2,250.00;

20. In favor of the plaintiff JEROME RIVERA and against the defendant MICHAEL S. WATTS, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$50.00 and punitive damages in the amount of \$200.00;

21. In favor of the plaintiff JEROME RIVERA and against the defendant CITY OF RIVERSIDE, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$2,250.00.



22. In favor of the plaintiff JEROME RIVERA and against the defendant CITY OF RIVERSIDE, for false arrest/false imprisonment, actual or compensatory damages in the amount of \$3,000.00;

23. In favor of the plaintiff JEROME RIVERA and against the defendant ROBERT PLAIT, for false arrest/false imprisonment, actual or compensatory damages in the amount of \$750.00, and punitive damages in the amount of \$250.00;

24. In favor of the plaintiff JEROME RIVERA and against the defendant MICHAEL S. WATTS, for negligence, actual or compensatory damages in the amount of \$50.00;

25. In favor of the plaintiff JEROME RIVERA and against the defendant LINFORD L. RICHARDSON, for negligence, actual or



compensatory damages in the amount of \$50.00;

26. In favor of the plaintiff JEROME RIVERA and against the defendant CITY OF RIVERSIDE, for negligence, actual or compensatory damages in the amount of \$500.00;

27. In favor of the plaintiff ENRIQUE FLORES and against defendant MICHAEL S. WATTS, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$50.00, and punitive damages in the amount of \$200.00;

28. In favor of the plaintiff ENRIQUE FLORES and against the defendant CITY OF RIVERSIDE, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$1,500.00;

29. In favor of the plaintiff ENRIQUE FLORES and against the defendant CITY OF

RIVERSIDE, for negligence, actual or compensatory damages in the amount of \$500.00;

30. In favor of the plaintiff ENRIQUE FLORES and against the defendant MICHAEL S. WATTS, for negligence, actual or compensatory damages in the amount of \$50.00;

31. In favor of plaintiff ENRIQUE FLORES and against the defendant LINFORD L. RICHARDSON, for negligence, actual or compensatory damages in the amount of \$50.00;

32. In favor of the plaintiff MANUEL FLORES, JR., and against the defendant GERALD MILLER, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$500.00

33. In favor of the plaintiff MANUEL FLORES, JR., and against the defendant

ROBERT L. PLAIT, for a violation of 42 U.S.C § 1983, actual or compensatory damages in the amount of \$1,000.00 and punitive damages in the amount of \$2,000.00;

34. In favor of the plaintiff MANUEL FLORES, JR., and against the defendant CITY OF RIVERSIDE, actual or compensatory damages in the amount of \$2,000.00;

35. In favor of the plaintiff MANUEL FLORES, JR., and against the defendant GERALD MILLER for negligence, actual or compensatory damages in the amount of \$500.00;

36. In favor of the plaintiff MANUEL FLORES, JR., and against the defendant ROBERT PLAIT, for negligence, actual or compensatory damages in the amount of \$1,000.00;

37. In favor of the plaintiff MANUEL FLORES, JR., and against the defendant CITY OF RIVERSIDE, for negligence, actual or compensatory damages in the amount of \$1,500.00.

FURTHER, on January 19, 1981, plaintiffs' and defendants' motions for reasonable attorneys' fees and costs came on regularly for hearing before the Honorable Mariana R. Pfaelzer, United States District Judge. Plaintiffs appeared by and through their counsel of record Gerald P. Lopez and Roy B. Cazares. Defendants appeared by and through their counsel of record, Jonathan Kotler and Patricia Kotler. The Court, having examined and considered the papers filed by the parties, having heard the argument of counsel, and having caused to be made and filed herein

its written Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for reasonable attorneys' fees and costs is hereby granted pursuant to 42 U.S.C. § 1988. Defendants are ordered to pay plaintiffs' reasonable attorneys' fees in the amount of \$245,456.25.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants' motion for attorneys' fees and costs is denied.

DATED: March 31, 1981

/ss/ Mariana R. Pfaelzer  
MARIANA R. PFAELZER  
United States District Judge

## APPENDIX 8

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,       )  
                                  )  
      Plaintiffs,               )  
                                  )  
      v.                           )  
                                  )  
CITY OF RIVERSIDE, et al.    )  
                                  )  
      Defendants.                )  
\_\_\_\_\_

No. CV 76-1803-F

Filed: January 10, 1978  
Clerk, U.S. District Court  
Central District of California

**MEMORANDUM OPINION AND ORDER**

Twenty-three of the thirty-two defendants named in this case have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendants filed affidavits in support of their motions and the plaintiffs

submitted counter affidavits in response. The defendants' motions were first heard on September 26, 1977. Additional affidavits were subsequently filed by both plaintiffs and defendants and the matter was taken under submission by the court. For the reasons stated below the motions will be granted as to 17 of the moving defendants, and denied as to 6 others.

It is a well-established rule that on a motion for summary judgment the moving party bears the burden of demonstrating the absence of any genuine issue of fact and of establishing that he is entitled to prevail as a matter of law. *Jones v. Halekulani Hotel, Inc.*, 557 F.2d 1308 (9th Cir. 1977). Therefore, in considering the instant motions, the court



must view the allegations of the complaint and the facts supporting them in the light most favorable to the plaintiffs. Nevertheless, in order to overcome a defendant's summary judgment motion, it must appear that the facts, when so construed, support a viable legal theory which would entitle the plaintiffs to a judgment against that defendant for the acts complained of. **Mutual Fund Investors v. Putnam Management Co.**, 553 F.2d 620, 624 (9th Cir. 1977). Bearing these principles in mind, and having carefully considered the affidavits and arguments presented by both sides, the court has made the following determinations:

1. As to the defendants Callow and R. Boyer the plaintiffs do not oppose the motions for summary judgment. These

officers were not present at the scene of the incident which forms the major basis for the plaintiffs' complaint.

2. As to the defendants Albee, Arel-lano, M. Boyer, Carroll, Conner, Dana, Felcher, Gann, Grutzmacher, Haywood, Henery, Nissen, Qualls, Shively and Tennell, the court finds that there are no genuine issues of fact remaining to be litigated in this case. These defendants were present at the scene of the incident, and several of them entered the Rivera residence in response to orders from their commanding officer. However, their affidavits establish that they did not have any physical or verbal contact with any of the plaintiffs, did not participate in the arrest or search of any of the plaintiffs, and did not personally engage in any conduct which

violated the plaintiffs' civil rights. The responsive affidavits filed by the plaintiffs are not sufficient to overcome this showing because none of the actions of these individual defendants which are referred to in the affidavits rise to the level of constitutional violations.

Furthermore, in their affidavits these defendants all deny having participated in any manner in a conspiracy or in any concerted action to violate the civil rights of the plaintiffs. Even accepting the broadest view of the scope of the schemes and conspiracy allegations of plaintiffs' complaint, these defendants have sworn that they were not a part of any such activity. No triable issue on this point is raised by the mere fact that these defendants were

present at the time of the incident in question, or that they made arrests or conducted searches of persons other than the plaintiffs. Also, no reasonable inference of an unlawful conspiracy can be drawn from the fact that some of these defendants conferred with each other before writing reports about the incident or that their reports were similar in content.

Likewise, plaintiffs' argument that there are genuine issues as to possible negligent violations of their civil rights by these defendants must fail. Cf. Navarette v. Enomoto, 536 F.2d 277 (9th Cir. 1976), cert. granted, 429 U.S. 1060 (1977). The defendants all deny having seen any violations of civil rights by other officers, and they deny withholding information or exculpatory

evidence. Again, no triable issue is raised by their mere presence at the scene. Cf. Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972), relied on by plaintiffs to support their argument on this point. In Byrd the Court of Appeals reversed a directed verdict in favor of three police officers who, it was established, were present in the back room of a bar with a dozen other officers who surrounded the plaintiff as he was severely beaten. In such a case, a reasonable question as to negligence is clearly raised by mere presence, since awareness of the civil rights violation taking place is obvious. There is no indication whatsoever that such an extreme situation is involved in this case.

3. Regarding the other six moving defendants it appears to the court that

there are material factual issues which cannot be resolved on the motions for summary judgment.

a. As to the defendants Smith and Taulli the plaintiffs point to answers to interrogatories indicating that these two officers assisted in the follow-up investigation which led to the filing of criminal complaints against some of the plaintiffs. Part of the alleged civil rights violations covered by plaintiffs' complaint concern these charges. Since the affidavits filed by these defendants do not address their participation in the investigation and any role they may have played in recommending prosecution of the plaintiffs, they are insufficient to support a summary judgment at this time.

b. Affidavits submitted by the plaintiffs regarding the defendants Eltringham and Olsen raise a genuine issue as to possible civil rights violations by those defendants as a result of their surveillance of the Rivera residence from a police helicopter on the night in question. The defendants deny direct physical contact with any of the plaintiffs, but their affidavits do not address the plaintiffs' allegations of harassment and invasion of privacy. It also appears that there is a material factual dispute regarding the claims of these defendants that they issued a dispersal order from their helicopter before any officers entered the Rivera residence. Therefore, their motions for summary judgment cannot properly be granted.



c. As to the defendant Richardson there remains an issue of possible liability based on his allegedly having ordered a "stake-out" of the Rivera residence and his request for additional officers to report to the scene. The affidavits submitted by this defendant do not refer to these orders.

d. There are conflicting affidavits on the question of whether the defendant Brading personally participated in the arrest and booking of the plaintiff Jerome Rivera. Such a conflict must be resolved against the defendant on this motion for summary judgment and his motion will therefore be denied.

IT IS THEREFORE ORDERED that the motions for summary judgment filed on



August 5, 1977 are granted as to the following defendants:

Richard Albee	Ernest Felcher
Peter Arellano	Daniel Gann
Mark Boyer	Fred Grutzmacher
Richard Boyer	Robert Haywood
George Callow	Ivan Henery
Gerald Carroll	Gary Nissen
Thomas Conner	Kenneth Qualls
Richard Dana	John Shively
	James Tennell

As to the following defendants, the motions for summary judgement filed on August 5, 1977 are denied:

James Brading	Linford Richardson
Donald Eltringham	Michael Smith
Jon Olsen	Don Taulli

IT IS FURTHER ORDERED that the clerk forthwith serve copies of this memorandum opinion and order by United States

mail upon counsel for the parties  
appearing in this action.

Dated this 9th day of January, 1978.

/ss/ Warren J. Ferguson  
WARREN J. FERGUSON  
United States District Court

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,       )  
                                  )  
                  Plaintiffs,    )  
                                  )  
                  v.                )  
                                  )  
CITY OF RIVERSIDE, et al.    )  
                                  )  
                  Defendants.     )  
\_\_\_\_\_ )

No. CV 76-1803-F

Filed: January 12, 1978  
Clerk, U.S. District Court  
Central District of California

Entered: January 13, 1978  
Clerk, U.S. District Court  
Central District of California

**JUDGMENT**

Pursuant to the memorandum opinion  
and order filed in this case on January  
10, 1978,

IT IS HEREBY ORDERED, ADJUDGED and  
DECREED that judgment be entered in

favor of the the following defendants,  
dismissing plaintiffs' complaint with  
prejudice:

Richard Albee	Ernest Felcher
Peter Arellano	Daniel Gann
Mark Boyer	Fred Grutzmacher
Richard Boyer	Robert Haywood
George Callow	Ivan Henery
Gerald Carroll	Gary Nissen
Thomas Conner	Kenneth Qualls
Richard Dana	John Shively
	James Tennell

IT IS FURTHER ORDERED that the clerk  
forthwith serve copies of this judgment  
by United States mail upon counsel for  
the parties appearing in this action.

Dated this 12th day of January, 1978.

/ss/ Warren J. Ferguson  
WARREN J. FERGUSON  
United States District Court

## APPENDIX 9

CAZARES & TOSDAL  
Attorneys at Law  
225 Broadway, Suite 1352  
San Diego, Ca 92101  
Telephone: (714) 233-6581  
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,                     )  
   )  
                  Plaintiffs,                     )  
   )  
          vs.                                     )  
   )  
CITY OF RIVERSIDE, et al.,                 )  
   )  
                  Defendants.                     )  
\_\_\_\_\_

No. CV 76-1803-MRP

**NOTICE OF MOTION AND MOTION BY  
PLAINTIFFS FOR REASONABLE ATTOR-  
NEYS FEES AND COSTS**

TO: THE DEFENDANTS AND THEIR COUNSEL OF  
RECORD:

PLEASE TAKE NOTICE that on Monday,  
December 15, 1980, or as soon thereafter

as counsel may be heard in the Courtroom of the Honorable Marianna R. Pfaelzer, District Judge, plaintiffs will move this Court for Attorneys Fees and Costs pursuant to 42 U.S.C. 1988.

Said motion will be based on the attached Memorandum of Law and the accompanying Affidavits.

DATED: 12/1/80

Respectfully submitted,

/ss/Roy B. Cazares  
ROY B. CAZARES

## INTRODUCTION

This memorandum or points and authorities will inform the court of the issues and authority relevant to an award of attorneys' fees in the present case. Roy Cazares and Gerald Lopez, plaintiffs' attorneys, have dedicated themselves to this civil rights action for the last five years. Having at last prevailed on the merits, plaintiffs now desire that the court award attorneys' fees pursuant to 42 U.S.C. 1988--the Attorney's Fees Awards Act of 1976. This memorandum will demonstrate the compelling need for awards of attorneys' fees in civil rights litigation, and the propriety of the requested award in this case.



I.

PLAINTIFFS' ENTITLEMENT TO AN  
AWARD OF FEES UNDER 42 U.S.C.  
1988

42 U.S.C. 1988 provides, in pertinent  
part:

In any action or proceeding to  
enforce a provision of sections  
1981, 1982, 1983, 1985 and 1986  
of this title..., the court, in  
its discretion, may allow the  
prevailing party, other than the  
United States, a reasonable at-  
torney's fees as part of the  
costs.

Section 1988 vests the court with the  
discretion to award attorneys' fees in  
this case. Although the statute fails  
to specify when an award of fees is  
appropriate, the legislative history  
firmly commands that "a party seeking to  
enforce the rights protected by the  
statutes covered by S. 2278 [1988]  
'should ordinarily recover attorneys'

fees unless special circumstances would render such an award unjust' **Newman v. Piggie Park Enterprises, Inc.**, 390 U.S. 400, 402 (1968) quoted in S. Rep. No. 94-1011, 94th Cong. 2nd Sess. 4 (1976). A brief overview of the circumstances which led to the enactment of section 1988 will help to explain the adoption of the stringent standard of **Newman v. Piggie Park**.

Section 1988 was enacted in response to the Supreme Court's decision in **Alyeska Pipeline Service Co. v. Wilderness Society**, 421 U.S. 240 (1975). In **Alyeska**, the Court disapproved a line of lower court cases in which attorneys' fees had been granted on a private attorney general theory in civil rights actions based on the Reconstruction statutes, 42 U.S.C. 1981-1983 and 1985-

1986. The lower courts had justified the awards on two grounds: first, that the civil rights actions furthered the public interest, and second, that since fees were specifically provided in the more modern civil rights statutes, it would be anomalous to deny them in cases brought pursuant to the Reconstruction amendments. See, Comment, Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fees Awards Act of 1976, 47 UNIV. OF CHI. L. REV. 332 (1980). **Alyeska** rejected this newly created exception to the so-called "American Rule" against awarding attorney's fees to prevailing parties because the exception constituted a judicial invasion of "the legislature's province." **Alyeska**, *supra*, at 271. Congress' response was extraordinarily

swift and unequivocal. It enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, allowing the award of attorney's fees to prevailing parties in suits to enforce the Reconstruction statutes.

Viewed in this context, section 1988 clearly embodies Congress' commitment to the enforcement of civil rights. The legislative history demonstrates Congress' concern that, in many instances, important rights would not be vindicated if counsel could not be employed to undertake civil rights litigation. By permitting fee-shifting, Congress sought to ensure the continued litigation of civil rights actions -- to guarantee that "civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce..."

S. Rep. No. 94-1011, 94th Cong., 2nd Sess. 6 (1976).

The Ninth Circuit has followed the congressionally-approved standard of **Newman v. Piggie Park**. In **Sethy v. Alameda County Water District**, 602 F.2d 894, 897 (9th Cir. 1979), the court recognized that "Congress plainly intended that successful plaintiffs 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' S. Rep. No. 94-1011, 94th Cong. 2nd Sess. 4, reprinted in U.S. Code Cong & Admin News pp. 5908, 5912 quoting **Newman v. Piggie Park Enterprises**, 390 U.S. 400 (1968)." Courts in the Ninth Circuit have likewise acknowledged the importance of attorneys' fees as a means of encouraging civil rights actions. In **Keith v.**

Volpe, No. CV-72-355-HP 6 (C.D. Cal., March 31, 1980), a 1983 action decided in the Central District of California, Judge Pregerson noted that "[c]ivil rights plaintiffs who, more often than not, bear the burdens that accompany poverty and minority status in our society, should be encouraged to use the federal courts to avail themselves of the promise of equality that abides in the Constitution."

Plaintiffs submit that an award of fees in this case is appropriate. Both the legislative history and the cases in this Circuit support the necessity of such an award as a means of fulfilling important policies reflected both in section 1988 and in the Reconstruction statutes generally.

## II.

### RETROACTIVITY

Although the present case commenced prior to the enactment of section 1988, plaintiffs' attorneys should be compensated for the entire period during which they rendered legal services. Section 1988 applies retroactively to all cases which were pending in 1976, the year of its adoption. In *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974), the Supreme Court held that an attorneys' fees statute should be retroactively applied to cases pending when the statute is passed. The Court based its holding on the principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory discretion or



legislative history to the contrary." **Bradley, supra**, at 711.

The legislative history of section 1988 leaves no doubt that section 1988 incorporates the rule in **Bradley**. The House Report, which specifically addresses the issue of retroactivity, states:

In accordance with the applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of the enactment as well as all future cases. **Bradley v. Richmond School Board**, 416 U.S. 696 (1974) in H.R. Rep. No. 94-1558, 94th Cong. 2nd Sess. 4, n.6 (1976).

The Ninth Circuit, moreover, in **Stanford Daily v. Zurcher**, 550 F.2d 464 (9th Cir. 1977), expressly approved the retroactivity of section 1988 in affirming an award of fees which had been made by the District Court prior to the enactment of



section 1988 in *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974). Thus, the rule of retroactivity approved both in the legislative history and by this Circuit supports plaintiffs' claim that all services rendered in this case should be compensated.

### III

#### FACTORS TO BE CONSIDERED BY THE COURT IN DETERMINING THE AMOUNT OF FEES TO BE AWARDED

The amount of fees to be awarded pursuant to section 1988 is another issue which was addressed by Congress in the legislative history of the Act. The Senate Report states:

It is intended that the amount of fees awarded under S. 2278 [1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust

cases and not be reduced  
because the rights involved  
may be non-pecuniary in  
nature. ... In computing the  
fee, counsel for prevailing  
parties should be paid, as is  
traditional with attorneys  
compensated by a fee-paying  
client, "for all time reason-  
ably expended on a matter."  
S.Rep. No. 94-1011, 94th  
Cong., 2nd Sess. 6 (1976)  
(emphasis added).

Courts confronted with the task of  
determining the amount of fees to be  
awarded generally begin with the calcu-  
lation of a base figure which reflects  
the amount of time reasonably expended.  
Then, in accordance with the legislative  
history, they adjust the award so that  
it comports with the standards of other  
"equally complex Federal litigation,  
such as antitrust cases." Plaintiffs  
will likewise address the issues in this  
sequence.

A. DETERMINATION OF A REASONABLE HOURLY RATE

An attorney's reasonable hourly rate serves as a basis for subsequent calculations leading to an award of fees. The legislative history of section 1988 suggests that the reasonable hourly rate should be based on a consideration of twelve factors. These factors were set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), a title VII case which was expressly approved in the legislative history of section 1988. See S.Rep. No. 94-1011, *supra*, at 6. According to *Johnson*, these factors are: time and labor required; novelty and difficulty of the questions; skill requisite to perform the legal service properly; preclusion of other employment by the attorney due

to acceptance of the case; customary fee; whether the fee is fixed or contingent; amount involved and results obtained; experience, reputation and ability of the attorneys; undesirability of the case; nature and length of the professional relationship with the client and awards in similar cases.

The **Johnson** factors serve as a basis for evaluation of a reasonable hourly rate in this case. As the remainder of this memorandum and the affidavits of Roy Cazares and Gerald Lopez demonstrate, the present case required enormous expenditures of time and demanded legal arguments on complex and untested theories. The contingent nature of the fees, and the favorable verdict obtained also militate in favor of a generous estimate of the reasonable hourly rate.

Finally, the skill and reputation of plaintiffs' counsel must be recognized. With regard to this factor, the Johnson court stated:

Most fee scales reflect an experience differential with the more experienced attorneys receiving larger compensation. An attorney specializing in civil rights may enjoy a higher rate for his expertise than others, providing his ability corresponds with his experience. Longevity per se, however, should not dictate the higher fee. If a young attorney demonstrates the skill and ability, he should not be penalized for only recently being admitted to the bar. Johnson, *supra*, at 718-19.

The professional conduct of Messrs. Cazares and Lopez in this case reflects a thorough knowledge of civil rights as well as complete command of litigation skills. These are the factors which must be focused upon in evaluating the experience, reputation and ability of

plaintiffs' counsel. Plaintiffs therefore contend that, applying the **Johnson** factors to this case, this Court is justified in awarding \$125.00 per hour as a reasonable hourly rate.

#### B. THE PROPRIETY OF A MULTIPLIER

The reasonable hourly rate multiplied by the number of hours expended provides a base figure, or lodestar. Once the lodestar has been fixed, it is appropriate for the Court to award successful plaintiffs a multiplier of the lodestar—that is, the court may double, triple or quadruple the lodestar. The legislative history of section 1988 supports the propriety of a multiplier, as is evidenced by its specific reference to fee awards in anti-trust cases. S.Rep. No. 94-1011 *supra* at 6. In the leading

anti-trust attorneys' fees case of Lindy Brothers Builders of Philadelphia v. American Radiator and Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), the court suggested that the multiplier be determined in light of both the contingent nature of success and the quality of the attorneys' work. The court emphasized that attorneys' fees cannot properly be determined merely by multiplying the hourly rate for each attorney times the number of hours devoted to the case.

The contingency and quality factors suggested by Lindy weigh heavily in favor of a multiplier in the present case. The Lindy court noted the special significance of the contingency factor "where the attorney has no private agreement that guarantees payment even if no recovery is obtained..." Lindy



supra at 168. In this case plaintiffs' counsel had no fee agreement. Had the jury returned a verdict for defendants, these attorneys would have received no compensation for their five years of labor.

The quality factor likewise supports a multiplier. The Lindy court stated that "[i]n evaluating the quality of an attorney's work in a case, the district court should consider the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of recovery obtained." Lindy supra at 168. This court is well-aware of the complexity of legal issues presented and the high quality of representation in the present case. In considering the amount of recovery, plaintiffs urge the



court to consider both its pecuniary and non-pecuniary implications. Because the verdict in this case resulted in the successful assertion of constitutional rights, a goal endorsed by Congress in the legislative history, it must be valued in terms which exceed the monetary damages awarded. All of these elements justify plaintiffs' request for a multiplier of two in the present case.

The reasonableness of plaintiffs' request is supported by other cases in which a multiplier was granted. A brief review of decisions in anti-trust cases and then in public interest cases will inform the Court as the range of possible multipliers. In *Lindy*, for example, the district court, on remand, doubled the amount obtained by mere application of the hourly rate in order

to account for the contingency and quality factors. 382 F.Supp. 999, 1024 (E.D. Pa. 1974). Attorneys in **Lindy** were awarded a fee of \$1,134,855.00 (or \$229/hour for 6,000 hours) though criminal prosecutions had preceded the filing of the complaint, though the suit was ultimately settled, and though petitioning counsel received an additional \$861,000.00 through private 33.3% contingent fee contracts.

In **In re Gypsum Cases**, 386 F.Supp. 959 (N.D. Cal. 1974), Judge Zirpoli relied on the **Lindy** factors and multiplied the hourly rate by three. The court underscored the role of the multiplier in encouraging private enforcement of anti-trust laws.

In **Philadelphia v. Charles Pfizer and Co. Inc.**, 345 F.Supp. 454 (S.C. N.Y.

1972), plaintiffs' counsel were awarded \$600,000.00 or an average of \$300.00 per hour. This fee was awarded despite the fact that most of the hours were devoted to fairly uncomplicated work, some of which was said to be duplicative, unwise or unnecessary. In *Arenson v. Board of Trade of City of Chicago*, 373 F.Supp. 1349 (N.D. Ill. 1974), a multiplier of four was awarded. Finally, in an unpublished opinion in *Goldstein v. Alodex Corp.*, Civ. No. TI - 1857 (E.D. Pa., Dec. 7, 1973), a multiplier of five was awarded.

Congress, in suggesting that anti-trust multipliers be the model in awards pursuant to section 1988, was not breaking new ground. In many earlier public interest cases decided in this Circuit, multipliers had been awarded based on

the same factors emphasized in **Lindy** -- contingency of the case and the quality of representation. See, e.g., Coalition for Los Angeles Planning in the Public Interest v. Board of Supervisors, L.A. Sup. Ct. No. C-63218 (1976) (multiplier of two in environmental lawsuit); Ser-rano v. Priest, No. C-933-254 (L.A. Co. Sup. Ct. April 1975) (multiplier of two in school financing case); Davis v. County of Los Angeles, 8 EPD ¶9444 (C.D. Ca. 1974) (bonus of \$7,193.42 in employment discrimination case); WACO v. Alioto, C-70-1335-WTS (Findings and Recommendations Re Attorneys' Fees, September 19, 1974) (multiplier of two and multiplication again by a 50% factor in section 1983 employment discrimination case). Thus, the courts of this

Circuit have recognized that multipliers, just as they encourage private enforcement of anti-trust laws, further the vindication of important rights and policies in public interest cases. To maximize the impact of attorneys' fees acts, the fees awarded "should be large enough to make the case desirable despite the risk of loss." **Palmer v. Rogers**, 10 E.P.D. ¶10,499 at 6131 (D.D.C. 1975) (Title VII action).

Courts in the Ninth Circuit, in accordance with the legislative history of section 1988 and with the decisions in other public interest cases, have, moreover, awarded multipliers and bonus awards in cases brought under the Civil Rights Attorney's Fees Awards Act. In **Stanford Daily v. Zurcher**, 64 F.R.D. 680 (N.D. Cal. 1974), the district court

awarded a bonus of \$10,000.00; this award, as noted above, was later approved by the Ninth Circuit as consistent with section 1988. **Stanford Daily v. Zurcher**, 550 F.2d 464 (9th Cir. 1977). More recently, in **Keith v. Volpe**, No. CV-72-335-HP (C.D. Cal., March 31, 1980), Judge Pregerson reaffirmed the **Lindy**, method of computing reasonable attorney's fees awarding plaintiffs a multiplier of 3.5. Such a multiplier was intended to reflect the contingent nature of the case, the quality of counsel's efforts, the effect of the delay between the time services were rendered and the date in which the order determining fees was entered, and finally, the impact of inflation. **Keith v. Volpe**, *supra* at 27.

Plaintiffs contend that the use of a multiplier is appropriate in this case. It is justified by the legislative history, by similar awards in public interest and anti-trust cases, and by awards granted pursuant to section 1988 within the Ninth Circuit. Moreover, the two factors which weigh most heavily in favor of a multiplier -- quality of representation and the contingent nature of success -- compel such an award in the present case. Finally, a multiplier is appropriate because it reinforces the policies of section 1988 by providing attorneys with an incentive to litigate legitimate civil rights claims even when the theoretical and practical obstacles are great.



C. COMPENSATION FOR TIME SPENT IN APPLY-  
ING FOR FEES

Plaintiffs seek to recover attorneys' fees for time spent by their counsel in preparing and presenting this motion. The propriety of such an award becomes evident when viewed in light of the legislative history and the policies of section 1988. The Senate Report recognized that "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S.Rep.No. 94-1011, 94th Cong. 2nd Sess. 2 (1976). The "essential remedy" sought to be afforded by section 1988 will be significantly diluted if attorneys are not compensated



for time spent in applying for fees. See, e.g., Prandini v. National Tea Co., 585 F.2d 47, 53 (3d Cir. 1978).

Much time has been devoted to preparing the motion for fees in this case. Plaintiffs' counsel, in addition to establishing the legal basis for their entitlement to fees, have had to sift through records and accounts generated during the last five years. Moreover, there is no assurance that further litigation relating to the matter of fees will not ensue. As the court in Stanford Daily v. Zurcher, 64 F.R.D. 680, 684 (N.D. Cal. 1974) noted, if such work were not compensated, it "would allow parties to dilute the value of a fees award by forcing attorneys into extensive uncompensated litigation in order to gain fees." By allowing attorneys'

fees for the time spent on the fee question, this Court can prevent potential disincentives to attorneys undertaking civil rights litigation, and thus further the policies of section 1988.

#### D. LAWCLERK AND PARALEGAL SERVICES

Plaintiffs request the Court to include charges for law clerk/paralegal services as part of the attorneys' fees award. The Ninth Circuit has approved the inclusion of these charges in fee awards. See, e.g., Pac. Coast Agr. Export Assn' v. Sunkist Growers, Inc., 526 F.2d 1196, 1210 (9th Cir. 1975); cert. den. 425 U.S. 959 (1976) (award of fees for work of legal assistants in anti-trust action); Keith v. Volpe, No. CV-72-355-HP 24 (C.D.Cal., March 31, 1980) (section 1983 action). In allowing

law clerk and paralegal charges in Keith, Judge Pregerson recognized that lawclerks and paralegals provide necessary services which, were they performed by attorneys, would be more costly. On this basis, plaintiffs have submitted law clerk time as part of their motion for fees.

#### E. COSTS AND EXPENDITURES

Plaintiffs contend that travel expenses necessarily incurred during the course of litigation should be awarded. In *Keith v. Volpe*, No. CV-72-355-HP 27 (1980), plaintiffs were awarded out of town travel expenses. The Court recognized that these expenditures were of the type which would ordinarily be charged to the to the client and concluded that equity required that

plaintiffs counsel be reimbursed. See also, Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 165 (1939) (power of court to award "as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit ...") In the present case an award of travel expenses is equally justified. Plaintiffs' attorneys, residents of San Diego, made numerous trips to Los Angeles and to Riverside in connection with the litigation. These expenses are not compensated by an award of fees and should be granted in addition to any fees awarded in this case.

#### IV

### PLAINTIFFS ARE ENTITLED TO AN INTERIM AWARD OF FEES

Having prevailed in the instant action, plaintiffs contend that they are entitled to an interim award of fees. Plaintiff's attorneys have expended considerable time and expense over a five year period without compensation. As outlined in plaintiffs points and authorities above, the legislative history of Section 1988 clearly indicates that attorney fee awards are an important component of Congress' efforts to insure that even the poor will have access to the Courts to vindicate Constitutional rights. While Section 1988 does not provide a specific time for the awarding of attorney fees, it is reasonable to conclude that the awarding of

interim fees promotes the vigilant protection of constitutional rights and promotes the public policy embodied in the Civil Rights Acts.

The Ninth Circuit, as well as other circuits, has recognized the propriety of awarding interim attorney fees. **Shaeffer v. San Diego Yellow Cabs, Inc.**, 462 F.2d 1002 (9th Cir. 1972) (description without comment by Ninth Circuit of interim fee procedure utilized by District Court); **Davis v. County of Los Angeles**, 8 FEP Cases 244, 8 E.P.D. ¶9444 (C.D. Calif. 1974) (\$60,000 interim fee award made without discussion of pending appeal and without the requirement of a bond); **Peters v. Missouri Pacific R.R. Co.**, 3 E.P.D. ¶8274 (E.D. Tex. 1971) (fees awarded by District

Court, without mention of pending appeal, but the existence of such an appeal is shown by appellate court decision at 483 F.2d 490 (5th Cir. 1973)). See also **Highway Truck Drivers and Helpers Local 107 v. Cohen**, 220 F.Supp. 735 (E.D. Pa. 1973) (fees awarded despite pending appeal in case under Labor Management Reporting and Disclosure Act). In **Malone v. North American Rockwell Corporation**, 457 F.2d 779 (9th Cir. 1972), the Ninth Circuit held that plaintiffs were entitled to an interim award even though they had prevailed solely on a procedural issue (the Title VII Statute of Limitations) and despite the fact that there had not been a decision on the merits. See also **Kaplan v. Iatse**, 525 F.2d 1354 (9th Cir. 1975).



Moreover, the Second Circuit has recently held in *Johnson v. University of Bridgeport*, Doc. Nos. 80-7350, 80-7374 (August 28, 1980), that an award of attorneys' fees is an integral part of the relief sought in a civil rights action and therefore the judgment is not final and appealable until they have been set by the court.

Plaintiffs assert that interim attorneys' fees in the instant case are not only proper, but said award would promote the underlying policy of Section 1988.

## V

### CONCLUSION

Based on the facts and points outlined above as well as in the affidavits and exhibits attached hereto, it is





submitted that the amount of  
pendent on this case is reason  
the hourly rates requested a  
able, that a multiplier or  
appropriate in this case,  
therefore this Honorable Cou  
make an award herein of \$495  
follows:

Law clerk/paralegal hours

Hours expended by Roy  
B. Cazares 692.75  
hours X \$125.00 per  
hour = \$86,593.75 X  
multiplier of two (2)= \$

Hours expended by  
Gerald Paul Lopez,  
1,265.50 X \$125.00 =  
158,187.50 X multi-  
plier of two (2)= \$

Costs incurred (Exhi-  
bit C) \$

TOTAL AWARD REQUESTED \$4

**BEST AVAILABLE COPY**



DATED: 12/1/80

Respectfully submitted,

/ss/Roy B. Cazares  
ROY B. CAZARES

DATED: 12/1/80

Respectfully submitted,

/ss/Gerald P. Lopez  
GERALD P. LOPEZ

CAZARES & TOSDAL  
Attorneys at Law  
225 Broadway, Suite 1352  
San Diego, Ca 92101  
Telephone: (714) 233-6581  
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,                     )  
   )  
                  Plaintiffs,                     )  
   )  
          vs.   )  
   )  
CITY OF RIVERSIDE, et al.,                 )  
   )  
                  Defendants.                     )  
\_\_\_\_\_

NO. CV 76-1803-MRP

**AFFIDAVIT OF GERALD P. LOPEZ  
RE: AMOUNT OF ATTORNEYS FEES  
REQUESTED**

GERALD P. LOPEZ, being duly sworn,  
deposes and says:

1. I am co-counsel for the plain-  
tiffs in the above-captioned action. I  
make this affidavit in order to bring to

the Court's attention certain facts which are relevant to the amount of fees requested in the accompanying application.

2. The memorandum of law filed concurrently with this affidavit shows that in determining the amount of the fees to be awarded, the usual practice is for the Court first to determine the number of hours expended and the appropriate hourly rate and then to calculate a base figure, a "lodestar", based on hours expended times hourly rate. The next step is to make adjustments from the base figure based on such factors as the contingent nature of the receipt of the fees and the result obtained for those represented. With this in mind, the remainder of this affidavit is divided into four sections, as follows: The

Attorneys' Hourly Rates; The Number of Hours Expended; The Appropriate Adjustments to the Normal Rates; and The Conclusion.

## I

### HOURLY RATES

3. The experience and background of the attorneys involved are, of course, relevant to the hourly rate to be awarded. The Court should therefore be aware of the following facts:

a. I was graduated from Harvard Law School in 1974. From 1974 to 1975 I was the law clerk to the Hon. Edward J. Schwartz, Chief Judge of the United States District Court, Southern District of California. In 1975 I opened my own practice, along with Roy B. Cazares (and two other persons) and since that time,

have been associated with Mr. Cazares, either as full-time partner or as of-counsel.

b. I have, since 1976, associated myself with Mr. Cazares only on civil rights cases. As Mr. Cazares' affidavit described, we have been reasonably successful in representing diverse clients with difficult and sophisticated claims.

c. In 1976 I began teaching law first in San Diego and then, beginning in the fall, 1978, at the UCLA School of Law. I teach one of only a handful of courses in this country devoted exclusively to civil rights legislation, and also teach a civil rights litigation seminar. In addition to my teaching responsibilities at UCLA, I have often been invited by groups throughout the



state to lecture on civil rights litigation, particularly §1983 claims.

4. It is submitted that the \$125.00 per hour request I am making in this case is reasonable for the following reasons: (a) I have concentrated on civil rights litigation since I finished my judicial clerkship in 1975, thereby making me more experienced, more efficient and, hopefully, more effective than others who litigate such claims (b) the "going rate" in Los Angeles for an attorney with my experience and background ranges between \$125.00 and \$150.00 per hour.

## II

### HOURS EXPENDED

5. To date I have expended 1,265.50 hours on the prosecution of this case.

This time can be generally described as having been expended in legal research of often novel yet necessary theories, in preparation of pleadings and motion papers, in discovery, in opposing motions to dismiss and motions for summary judgment, in interviewing plaintiffs and witnesses, in answering interrogatories, in analyzing police reports, in compelling unanswered or improperly objected interrogatories and requests for production, in preparing for depositions, in summarizing depositions and reviewing deposition summaries, in preparing the pre-trial order and memoranda of contentions of fact and law, in outlining questions for witnesses at trial, in preparing instructions, in other trial preparation in conference with

plaintiffs and co-counsel, and in reviewing and analyzing responses in discovery.

6. The primary reason that the number of hours expended is large is because of the breadth and complexity of the case. As this Court is well aware, both the state of the law and the state of the facts as of 1975 and 1976 required innovative lawyering and investigating; there was no blueprint for this case when we brought these claims.

7. A secondary reason that this case involved many hours of labor was the litigious nature of defendants. We do not desire to belabor the point, but it is not unimportant that access to obviously relevant discovery was blockaded at every turn; that legal issues were often and persistently misinterpreted

and misconstrued; that objections to discovery, exhibits and witnesses were often at best tenuous, even incomprehensible. It also merits this Court's attention that a group of defendants (granted Summary Judgment by Judge Ferguson) and their counsel found it appropriate to file a malicious prosecution complaint against both our clients and ourselves (sic) in the Riverside Superior Court. Only extraordinary effort to remove the case to federal court - where it was dismissed by Judge Ferguson - avoided the burden of defending that allegedly good faith claim at the same time plaintiffs were prosecuting this action. Finally, and perhaps the best evidence of the litigious nature of defendants, the number of hours expended is great because defendants never once

made a reasonable settlement offer. Trial, as this Court is aware, was necessary to vindicate our clients rights.

### III

#### ADJUSTMENTS TO HOURLY RATES

8. A multiplier or "bonus" award should be afforded above the normal hourly billing rates. As both the accompanying Memorandum of Law and affidavit of Mr. Cazares explain, such a multiplier is not only appropriate, but perhaps paradigmatically so if citizens are to continue to value the rights of the national community. It is not difficult to imagine that absent such bonuses fewer and fewer attorneys willing to risk a good portion of their

professional lives on difficult and  
highly contingent claims.

#### IV

#### CONCLUSION

9. Based on the facts and points outlined above as well as in the other affidavits and in the brief submitted herein, it is submitted that the amount of time expended on this case is reasonable, that the hourly rates requested are reasonable, that a multiplier or bonus is appropriate in this case, and that therefore this Court should make an award herein of \$495,713.51.

/ss/Gerald P. Lopez  
GERALD P. LOPEZ

SUBSCRIBED AND SWORN TO before  
me this 1 day of December, 1980.

/ss/Marianne V. Roiz  
Notary Public in and for said  
County and State

Official Seal  
Marianne V. Roiz  
Notary Public, California  
My Commission Exp. July 18, 1982

CAZARES & TOSDAL  
Attorneys at Law  
225 Broadway, Suite 1352  
San Diego, Ca 92101  
Telephone: (714) 233-6581  
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,  
Plaintiffs,  
vs.  
CITY OF RIVERSIDE, et al.,  
Defendants.

No. CV 76-1803-MRP

**AFFIDAVIT OF ROY B. CAZARES  
RE: REQUEST FOR ATTORNEYS  
FEES**

ROY B. CAZARES, being duly sworn,  
deposes and says:

1. I am co-counsel for the plain-  
tiffs in the above-captioned action. I



make this affidavit in order to bring certain facts to the Court's attention which are relevant to the amount of attorney's fees requested in plaintiff's application for attorney's fees.

2. Initially, it should be stated that during the settlement conference on August 31, 1979, this Honorable (sic) Court informed Counsel for Defendants that the case was complex and that plaintiffs were fully entitled to legal representation. This Court directed defendant's attorney to consider the substantial exposure of defendants to attorney fees alone, and advised counsel to consider said exposure in discussing settlement. Attorney for defendants returned to the settlement conference and repeated his principal's position that they would not offer more than

\$10,000.00 in full settlement of all claims including attorney fees. This offer to settle all claims including attorney fees was made after five years of extensive pre-trial discovery and litigation. Counsel for defendants knew or should have known that expenses alone nearly totalled \$7,000.00.

3. The memorandum of law filed concurrently with this affidavit shows that in determining the amount of the fees to be awarded, the usual practice is for the Court first to determine the normal hourly rates charged and the number of hours expended on the case and then to calculate a base figure based on hourly rates times number of hours expended. The next step then is to make adjustments from the base figure based on such factors as the contingent nature of the

receipt of fees and the result obtained for the represented plaintiffs. With this in mind, the remainder of this affidavit is divided into four sections, as follows: The Attorneys' Hourly Rates; The Number of Hours Expended; The Appropriate Adjustments To The Normal Rates; and the Conclusion.

## I

### HOURLY RATES

4. The experience and background of the attorneys involved is relevant to the hourly rate to be awarded. Therefore, affiant respectfully invites the Court's attention to the following facts:

a. I graduated from San Diego State College with honors and with distinction in 1970, I graduated from Harvard Law

School in 1973. Between July of 1973 and May of 1975, I was employed as a staff trial attorney with the Defenders Program of San Diego County. As a trial attorney with the Defenders Program, I was responsible for all phases of litigation in criminal defense for indigents. I handled virtually every single type of offender and represented clients in various forums such as the Municipal Court, Superior Court, Court of Appeals, Juvenile Court, Family Law Court, Mental Health Court, Parole Hearings, California Rehabilitation Center Exclusion Hearings, Mentally Disordered Sex Offender Hearings, Civil Addict Program Hearings and Welfare Board Hearings. I was solely responsible for all phases of the cases from initial bail reviews to exhaustion of appellate relief. I

prepared and argued numerous pre-trial motions, extraordinary writs, appeals and motions for past conviction relief. I handled in excess of five hundred criminal cases of which many went to jury trial in the Superior Court.

b. In May of 1975, I started private practice with the firm of Jones, Caza-  
res, Adler and Lopez. The firm handled a general practice with a strong emphasis on civil rights and representation of low income clients. Since entering private practice I have been involved in cases such as the following: **Aleman v. Alvarado, Laborers Local 89**, Civil Case No. 76-407-T, S.D. Cal. The "Local 89" case arose out of complaints made to affiant that union leaders were mishandling various pension funds. Affiant obtained the cooperation of the United

States Attorney in prosecuting union leaders while plaintiffs sought civil relief. Ultimately seventeen union officers or ex-officials were convicted and ordered to pay restitution to the union.

United States of America, Chicano Federation, et al., v. San Diego County, et al, Civil Case No. 76-1094-S, S.D. Cal. As attorney for plaintiff Chicano Federation of San Diego County, Inc., a party plaintiff, I was directly responsible for the implementation of a five year consent decree that provides broad based relief for Chicanos, women, blacks and Pan-Asians who have suffered the effects of past employment discrimination in County hiring, promotion, training and transfer policies. I have been involved in challenging hiring

tests in terms of reliability and validity. I obtained an injunction against the County Board of Supervisors to prevent them from circumventing the Consent Decree and I have assisted in analysis of progress towards meeting interim goals in the Decree.

**Lisa Martine Pliscou** by her Guardian Ad Litem, **Norm Pliscou v. Holtville Unified School District**, Civil Case No. 75-0926-GT. Our firm represented a young high school student in protecting her rights guaranteed under the First Amendment to the Constitution. We were the prevailing party.

**The People of the State of California v. Federico Frank, Patricia Zerda Zerda, et al.**, Crim No. 39862, Superior Court, San Diego County. I represented Patricia Zerda Zerda in a multiple defendant



murder trial that lasted approximately five months. It was the longest murder trial in the history of San Diego County at the time and involved unique legal issues. The case involved Colombian and Swiss nationals arrested in the Republic of Mexico for a homicide committed in San Diego. The Court specifically requested that I participate in the defense.

**Berry, et al., v. City of San Diego.** This was a Title VII class action in which we represented the discriminatory hiring practices of the San Diego Police Department and defendant City of San Diego. Six of the eight named plaintiffs were reinstated with back pay and broad based relief for the class was insured by a consent decree entered into by the parties.



In addition to approximately seventy five actual trials in the state courts, I have been retained to try various cases in the Federal District Court. As a litigation specialist I have also represented clients before a variety of other hearings such as formal labor arbitrations (I've won 12 out of 15 arbitrations), Department of Motor Vehicle Hearings, Insurance Arbitration Hearing, National Labor Relations Board Hearings, U.S. Customs Hearings, Immigration and Naturalization Service Hearings on deportations and exclusions, Social Security Administration Hearings, Administrative Law Hearings re: Longshoremen and Harbor Workers' Act, California Labor Commission Hearings, California OSHA Hearings and U.S. Department of Labor Hearings.

c. I have received awards and certificates of appreciation from the following:

Cabrillo Foundation, award for outstanding community services; San Diego Legal Aid Society for service to the Board of Directors,

1979 Joint California State Legislature Resolution For Outstanding Leadership in the area of Civil Rights,

San Diego County Fiscal and Justice Planning Agency for service to the Board of Advisors,

La Raza Lawyers Association for service as first President of the Association.

I have served on various boards and commissions such as:

Commission of the Californias  
Legal Aid Society

National Conference of Christians  
and Jews

California Rural Legal Assis-  
tance, Inc.

San Diego County Fiscal and Jus-  
tice Board

Chicano Federation, Justice Com-  
mittee

Alba 80 Society (Scholarship  
Foundation)

Sweetwater Unified School Dis-  
trict

Title I Advisory Committee

Chicano Free Clinic Board

d. In addition to practicing law, I  
have taught Police Community Relations  
at Southwestern College and Civil  
Rights, Constitutional Law and Immigra-  
tion Law and Practice at San Diego State  
University. I have lectured to attorney

groups on international law between Mexico and the United States and have consulted with other attorneys on how to litigate immigration, personal injury and civil rights cases. I have lectured to the Association of Mexican American Educators, California Association of Bilingual Educators, the San Diego Policy Academy, San Diego City Schools, San Diego County Schools and a number of college university, and high school classes.

5. It is submitted that the \$125.00 per hour request I am making in this case is reasonable because:

a. In the five years since I started working on this case, inflationary pressures have caused a rise in the normal hourly rate charged by attorneys.

b. I have extensive litigation experience over a broad range of legal issues and I am therefore considered more experienced than most attorneys with seven years in practice.

c. The issues in the case were complex and probably beyond the expertise of lawyers with less experience.

d. The normal rate for complex litigation in Los Angeles is \$150.00 per hour.

## II

### HOURS EXPENDED

6. To date I have expended 681.25 hours in the preparation and and prosecution of this case. In general, I have spent much of the time in discovery, depositions, witness interviews, legal research, answering interrogatories,

investigation, preparation for pretrial conferences, reviewing extensive police reports, preparing for trial and trial. I have made numerous trips to Los Angeles and Riverside to prepare for trial. The law of the case changed frequently and dramatically during the pretrial stages, thus necessitating expanding discovery to conform to emerging doctrines.

Plaintiffs in this case could not retain local counsel to represent them because of the highly politicized background of the case. Two weeks after the incident giving rise to this lawsuit, Chicanos from Casa Blanca openly rebelled against perceived police abuses against them. Several police officers and civilians were injured and property

damage was high. The Casa Blanca incidents received national press and the Program 60 Minutes did a series on police community problems in Riverside. Your affiant and his law partners accepted the case because we felt it had great merit and because it was our opinion that the plaintiffs would go unre-presented if they had to rely on local atotrneys (sic). Therefore, of necessity, the case was such that it required many hours of travel time both to the site of the incident and to the Federal Court in Los Angeles.

Attached hereto is exhibit A which describes the activity engaged in by affiant during the time billed.

7. I have reviewed the following records of hours expended by law clerks



Julie Davis and Mark Crowley and the hours expended appear to be reasonable:

Julie Davis:

September 20, 1980	Research	5.00
September 22, 1980	Research	4.00
September 23, 1980	Research	2.00
October 14, 1980	Research	2.00
October 17, 1980	Research	4.00
November 7, 1980	Research	5.00
November 8, 1980	Research	7.00
November 10, 1980	Research	5.00
November 12, 1980	Research	1.00
November 14, 1980	Research	3.00
November 19, 1980	Research	1.50
November 23, 1980	Motion	<u>4.00</u>
	Total	43.50

43.50 X \$25.00 = \$1,087.50

Mark Crowley:

June 13, 1979	Witness interviews (Riverside)	6.00
June 14, 1979	Witness interviews (Riverside)	6.00
March 10, 1980	Reviewed Discovery	5.50
March 11, 1980	Reviewed Discovery	5.50
March 12, 1980	Trial preparation	6.00



March 17, 1980	Traveled with Mr. Cazares to Riverside to Interview witnesses	10.00
March 18, 1980	Helped to collate discovery	<u>2.00</u>
	Total	41.00
41 hours X \$25.00 =		\$1,025.00

Julie Davis is a third year law student at UCLA School of Law. Mark Crowley is a recent admittee to the Bar.

Total paralegal/law clerk time expended	\$2,112.50
--	------------

#### IV

#### ADJUSTMENTS TO HOURLY RATES

8. A multiplier or "bonus" award should be afforded in this case above the normal hourly billing rates. The multiplier which plaintiffs seek in this case is 2.00 times the hourly rates for

attorneys. We ask that this multiplier be applied only to the normal billing rates of Messrs. Cazares and Lopez; we do not ask that the multiplier be applied to the law clerk and paralegal rates. For Messrs. Cazares and Lopez, the total fees requested total \$244,781.25. When the multiplier of 2.00 is applied to this figure, the total is \$489,562.50. In turn, when to this figure is added the charges for the paralegal and law clerk time, and the disbursements our total fee request amounts to \$495,713.51.

9. There are several reasons that a "multiplier" or bonus award is appropriate in the instant case. The law on the point is fully discussed in the "Plaintiffs' Memorandum of Points and Authorities In Support of Motion For Attorneys'

Fees", submitted concurrently with this affidavit.

10. Plaintiffs believe that the principle reason that a multiplier award should be made in this case is because it would encourage other attorneys to represent low income plaintiffs in important civil rights cases on a contingent fee basis. It is only fair and reasonable that attorneys willing to assume these type of cases be reimbursed in such a fashion that insures that lawyers will be willing to represent even those who cannot afford to pay or to advance costs. Plaintiffs believe that the vindication of constitutional rights is equally as important as the protection afforded the free market economy by successful antitrust litigants. Many attorneys will only protect

the poor or the unpopular against constitutional deprivations if they can feel reasonably assured that their commitment to that cause will be recognized as a service to the community as well as the litigants. The poor, the unpopular and those lacking in power have the same rights to preserve their dignity as everyone else. To the extent that courts encourage the protection of their constitutional rights, society in general is served.

DATED: 12/1/80

Respectfully submitted,

/ss/Roy B. Cazares  
ROY B CAZARES

SUBSCRIBED AND SWORN TO before me  
this 1 day of December, 1980.

/ss/Marianne N. Roiz  
Notary Public in and for said  
County and State

Official Seal  
MARIANNE N. ROIZ  
Notary Public - California  
My Commission Expires July 18, 1982

HOURS SUBMITTED BY ROY B. CAZARES

8/21/75	Travel to Riverside to conduct preliminary interviews of potential plaintiffs and approximately ten witnesses, took photographs of area and conducted preliminary investigation	13.00
8/25/75	Conference with Jerry Lopez re: results of trip to Riverside, potential causes of action	2.00
9/22/75	Conference with Jerry Lopez re: research into individual and municipal liability	2.50
9/30/75	Conference with Lopez re: theories of liability and what plaintiffs we are going to represent	1.50
10/3/75	Meeting with clients in our offices regarding representation and facts of incident	2.50
10/23/75	Worked on 100 day demands re: exhaustion of administrative remedies	1.00

10/23/75	Meeting with Manuel Flores, Jr. and Jerry Rivera re: progress of case and new witnesses	2.00
10/25/75	Travel to Riverside to file 100 day demands, investigation, witness interviews (with Jerry Lopez)	8.50
11/20/75	Conference with J. Lopez re: Riverside	1.50
11/21/75	Conference with clients	3.50
11/25/75	Conference with Jerry Lopez	1.00
12/15/75	Conference with Jerry Lopez re: Riverside claims for damages	1.50
1/14/76	Conference with Jerry Lopez re: difficulty in identifying defendants and John Doe pleading	1.00
1/28/76	Conference with Jerry Lopez re: Insurance company request for indemnity	.45
2/18/76	Worked with Jerry Lopez on cause of action against City of Riverside	1.50

3/19/76	Meeting with Jerry Lopez re: pendant claims and damages	2.00
3/29/76	Conference with Jerry Lopez and Napoleon Jones re: elements of proof of psychological damages for Donald Rivera and Mark Larra-bee	1.50
4/9/76	Meeting with Jerry Rivera	1.00
4/29/76	Meeting and research into statutory immunity and basis for injunctive relief	2.50
5/19/76	Reviewed draft of complaint	1.50
6/16/76	Conference re: discovery, interrogatories or depositions	1.00
7/2/76	Reviewed answer to complaint; conference with Jerry Lopez	1.00
7/15/76	Reviewed complaint No. 76-1901 re: co-plaintiffs	.75
8/24/76	Conference with Jerry Lopez re: discovery of police files and manuals	1.50



9/17/76	Reviewed cross-examination notes of attorneys made during criminal prosecution	2.00
9/24/76	Reviewed a series of police reports re: incident	1.50
10/15/76	Conference with Jerry Lopez re: deposition scheduling	1.50
10/17/76	Conference with Jerry Lopez and Samuel Paz, attorney for co-plaintiff re: discovery, dispositions	2.50
12/13/76	Reviewed witness statements	2.75
12/14/76	Meeting with Jerry Lopez re: depositions	1.50
12/15/76	Travel to Riverside Preparation of plaintiffs for depositions	2.00 7.00
12/16/76	Depositions of Jerome Rivera, Jennie Rivera, Lee Roy Rivera, Donald Rivera	8.00
1/6/77	Conference with Lopez re: deposition	2.00
1/10/77	Preparation for the depositions of Sgt.	

	L.L. Richardson, Officer Gerald Miller, Officer Joachim Palm, Officer Robert Plait, Officer Kenneth Qualls, Sgt. Michael Watts, 5:00 p.m. to 11:30 p.m.	6.50
1/10/77	Read motion to dismiss City	1.25
1/11/77	Travel to Los Angeles for depositions Depositions of: Sgt. L.L. Richardson, Officer Gerald Miller, Officer Joachim Palm, Officer Robert Plait, 10:a.m. to 4:00 p.m.	5.00
1/12/77	7:00 a.m. to 9:30 a.m. preparation for depositions Depositions of: Sgt. Michael Watts, Officer Kenneth Qualls, 10:00 a.m. to 1:45 p.m. Conference with attorney Samuel Paz Travel from Los Angeles to San Diego	3.75 1.75 2.45
1/13/77	Conference with Jerry Lopez re: defendant depositions	1.00
1/28/77	Proof read motion in opposition to dismiss City	1.00

2/1/77	Correspondence from Jennie Rivera	.20
2/7/77	Reviewed defendants motion to dismiss	2.00
2/11/77	Received correspondence from Lee Roy Rivera including medical history	1.00
2/15/77	Conference re: defendants interrogatories	1.50
3/3/77	Read draft of opposition to individual motions to dismiss	1.00
3/15/77	Reviewed defendants reply to our opposition to motion to dismiss	.75
3/25/77	Reviewed correspondence and stipulation	.25
3/25/77	Read individual defendants reply to our opposition to motion to dismiss	1.00
3/29/77	Correspondence from Kotler re: plaintiffs responses to interrogatories	.50
4/11/77	Reviewed defendants second set of interrogatories consisting of 414 questions	3.50

4/15/77	Read defendants to require further answers to interrogatories; reviewed answers to first set of interrogatories	1.50
4/18/77	Conference re: defendants discovery tactics and oppressive interrogatories	.50
5/6/77	Read plaintiffs points and authorities in opposition to defendants motion to compel further answers	1.00
5/11/77	Reviewed defendants opposition to plaintiffs motion for protective order	.75
7/6/77	Worked on plaintiffs responses to interrogatories	3.00
7/7/77	Worked on plaintiffs answers to defendants interrogatories	3.00
7/22/77	Read defendants memorandum in opposition to plaintiffs motion to compel	1.00
8/5/77	Read defendants answers to plaintiffs interrogatories (2nd set)	2.00

8/5/77	Reviewed defendants motion for summary judgment	1.75
8/19/77	Conference with Jerry Lopez re: summary judgment	1.00
9/7/77	Reviewed draft of opposition to defendants motion for summary judgment	1.00
9/19/77	Review of draft of Supplemental Points and Authorities in Opposition to Defendants Motion for Summary Judgment	1.00
9/22/77	City of Riverside's opposition to motion to compel	1.00
9/29/77	Conference with Jerry Lopez re: all motions and interrogatories, case review	3.00
10/3/77	Prepared correspondence to clients re: authorizations for release of medical information	1.00
11/7/77	Reviewed defendants motion to compel further answers	.75

12/8/77	Reviewed draft opposition to defendant's motion to compel	.75
1/24/78	Review of defendants taxing of costs on summary judgment	.50
1/26/78	Conference with Jerry Lopez re: taxing of costs	1.00
2/3/78	Witness interview in Riverside and travel 8:00 a.m. to 5:00 p.m.	10.00
2/9/78	Conference with Jerry Lopez re: expert testimony	1.00
2/27/78	Review of extensive medical records of Manuel Flores, Jr. in preparation for deposition of Harlan H. Omlid, M.D., review of doctor/patient privilege 6:00 p.m. to 9:45 p.m.	3.75
	Conference with Jerry Lopez	1.00
2/28/78	Travel to Fontana, Ca for deposition Deposition of Harlan H. Omlid, M.D. 2:00 p.m. to 3:00 p.m.	1.50
	Travel from Fontana to San Diego	2.50

3/1/78	Preparation for deposition 10:30 a.m. to 12:00 p.m.	1.50
	Travel from San Diego to San Bernardino 12:00 to 2:00 p.m.	2.00
	Deposition of Donald J. Feldman, M.D. 2:00 to 3:30 p.m.	1.50
	Return to San Diego	2.00
4/7/78	Review of further answers submitted by City on motion to compel	2.00
4/19/78	Conference with Jerry Lopez re: discovery against City to establish practice or policy	1.00
4/21/78	Conversation with Kotler and follow-up correspondence re: stipulation	.50
5/3/78	Served by San Diego County Sheriff with complaint for malicious prosecution, review of complaint	1.00
5/3/78	Conference (telephone) with co-defendant Jerry Lopez on malicious prosecution and re: cross-complaint for abuse of process	.50



5/4/78	Correspondence to Kotler re: discovery	.50
5/15/78	Conference with Jerry Lopez re: removal of case, malicious prose- cution, to federal court	2.00
5/16/78	Review of petition for removal and supporting affidavit	1.00
5/15/78	Review motion to dis- miss and motion for summary judgment	1.00
6/6/78	Review of motion by defendant to remand to Superior Court	.75
6/16/78	Review to our motion for summary judgment	1.75
7/6/78	Reviewed defendants response to our oppo- sition to defendants motion to remand	.75
7/18/78	Reviewed individual and City's answers to interrogatories	1.50
7/19/78	Reviewed answers to interrogatories	1.50
8/2/78	Drafted notice of deposition	.25



8/10/78	Conference with Jerry Lopez re: discovery	2.00
8/28/78	Preparation for deposition 4:00 p.m. to 5:30 p.m.	1.50
8/29/78	Travel from San Diego to Riverside	2.15
	Deposition of Officer Jan E. Olson 10:30 a.m. to 12:00	1.50
	Travel from Riverside to San Diego 1:00 p.m. to 3:30 p.m.	2.50
9/6/78	Reviewed Casa Blanca Operational Plan	1.75
9/18/78	Review Kotler letter re: pre-trial conference, conversation with co-counsel	.25
9/19/78	Cover letter and notice of deposition of Eltringham, Webster, Innskeep	.50
9/20/78	Review of letter and stipulation from Kotler	.25
10/4/78	Preparation for deposition of Officer Donald B. Eltringham, 1:00 p.m. to 2:30 p.m.	1.50
10/5/78	Travel to Riverside from San Diego, 8:00	

	to 10:00 a.m.	2.00
	Deposition of Officer Donald Eltringham	
	10:30 a.m. to 11:45 a.m.	1.25
	Return to San Diego	2.20
10/6/78	Review of Kotler's correspondence re: deposition of Ferguson, conference with Jerry Lopez	.50
10/10/78	Drafted correspondence to Kotler re: deposition and pretrial conference	1.00
10/13/78	Reviewed correspondence from Kotler re: depositions and pretrial conference	.50
10/18/78	Correspondence to Kotler	.75
11/8/78	Correspondence to Kotler re: cancelled depositions and in response to his letter	.50
11/13/78	Conversation with Kotler re: Stipulation	.25
11/28/78	Set up deposition in Salinas	.25
11/28/78	Letter to Kotler re: site and time of Ferguson's deposition in Salinas	.25

12/3/79	Correspondence to all plaintiffs re: 3/25/80 trial date	.75
12/11/78	Conference with Jerry Lopez	.50
12/11/78	Preparation for the depositions of Deputy District Attorneys Daniel Webster, Donald Innskeep and Detective Michael Smith 3:00 p.m. to 4:30 p.m.	1.50
	5:00 p.m. to 7:00 p.m.	2.00
12/12/78	Travel from San Diego to Riverside 7:30 a.m. to 10:00 a.m.	2.50
	Deposition of Detec- tive Michael Smith 10:00 a.m. to 11:45 a.m.	1.75
	Deposition of Deputy District Attorney Daniel Webster 1:30 p.m. to 2:30 p.m.	1.00
	Deposition of Deputy District Attorney Donald Innskeep, 2:30 p.m. to 3:30 p.m.	1.00
	Conference with Jennie Rivera, 4:00 p.m. to 6:00 p.m.	2.00
	Travel from Riverside to San Diego, 6:00 p.m. to 8:15 p.m.	2.25

12/18/78	Preparation for deposition of Thomas Blanchard, M.D., 8:30 a.m. to 9:30 a.m.	1.00
12/19/78	Travel from San Diego to Fontana, CA 7:30 a.m. to 10:00 a.m.	2.50
	Deposition of Dr. Blanchard, 10:30 to 11:30 a.m.	1.00
	Conference with Jennie Rivera 12:00 p.m. to 1:00 p.m.	1.00
	Travel from Riverside to San Diego 1:00 to 3:00 p.m.	2.00
12/26/78	Letter to Kotler re: Jerry Rivera	.25
12/28/78	Preparation for deposition for Chief Ferguson 4:30 p.m. to 7:00 p.m.	2.50
	Travel to Salinas, CA, from San Diego via Monterrey, Ca, 6:30 to 11:00	4.50
	Deposition of Chief Ferguson 11:00 a.m. to 12:25 p.m.	1.40
	Travel from Salinas to Monterrey to San Diego, 1:30 to 6:00 p.m.	4.50
1/18/79	Received and reviewed defendants opposition	

	to further continuances and demand for early trial date	.75
1/22/79	Pre-trial conference in Los Angeles, preparation and travel to and from Los Angeles	5.75
2/1/79	Conference with Jerry Lopez	1.50
2/1/79	Travel from San Diego to Los Angeles for pretrial conference with Mr. Kotler, 7:30 a.m. to 10:00 a.m.	2.50
	Pre-trial conference and exchange of exhibits, 10:00 a.m. to 11:45 a.m.	1.75
	Travel from Los Angeles to San Diego 2:30 to 5:00 p.m.	2.50
2/8/79	Proof read contentions of law and fact, signed	2.75
2/26/79	Preparation for pre-trial conference, pretrial conference, travel to and from Los Angeles	6.75
2/27/79	Pretiral preparation, review of witness statements	3.00

3/5/79	Pretrial preparation and review of interrogatories	2.00
3/10/79	Review of witness statements in preparation of trial	4.00
3/12/79	Worked on amended pretrial order	2.50
3/14/79	Reviewed police reports	2.50
3/16/79	Reviewed amended pre-trial order	1.00
3/19/79	Worked on amendment to pretrial order	1.00
3/20/79	Read, drafted supplemental memorandum of law	1.00
3/24/79	Worked on trial preparation re: direct examination of plaintiff's witnesses	3.00
3/28/79	Drafted affidavit in opposition to defendant's motion to exclude evidence	2.00
3/29/79	Correspondence to Clerk, U.S. District Court re: subpoenas	.30
4/2/79	Received and reviewed defendants response to plaintiffs supplemental memorandum of law	.75

4/3/79	Letter to clerk re: subpoena	.25
4/3/79	Correspondence to Mr. & Mrs. Larrabee re: trial date of April 17, 1979	.25
4/9/79	Preparation for, tra- vel to, pretrial con- ference and conference	6.75
4/16/79	Preparation for pre- trial conference, travel to and from Los Angeles for pretrial conference	5.30
	Pretrial conference with attorney Kotler to exchange exhibits and to work out stipu- lations	2.50
4/27/79	Preparation of plain- tiffs Second Supple- mental Memorandum of law, 9:00 a.m. to 3:00 p.m.	5.00
5/12/79	Cross-referenced ori- ginal witness state- ments with subsequent interviews, selected witness, review approximately 400 pages of notes of interviews	6.00
5/15/79	Received and reviewed defendants response to	



	plaintiffs Second Supplemental Memorandum of law	.50
5/21/79	Received and reviewed defendants motion to dismiss for failure to prosecute and supporting affidavit	1.00
6/4/79	Preparation of proposed stipulations and modified exhibit list	2.00
6/7/79	Correspondence to court	.25
6/13/79	Travel to Riverside with Mark Crowley for interviews with witnesses	6.00
6/14/79	Witness interviews in Riverside and return to San Diego	6.00
6/15/79	Preparation of opposition to defendants motion to dismiss for lack of prosecution, 2:00 p.m. to 5:00 p.m. Meeting with Jerry Lopez	3.00
6/19/79	Correspondence to Kotler re: requests for stipulations and exhibits	1.00
	Correspondence to court	.25



6/22/79	Received and review defendants affidavit in response to plain- tiffs affidavit oppos- ing motion to dismiss for lack of prosecu- tion	.50
7/2/79	Preparation for, tra- vel to, and hearing on motion to dismiss for lack of prosecution	7.50
7/5/79	Travel to Los Angeles, preparation of exhi- bits	6.00
7/11/79	Reviewed defendants objection to plain- tiffs modified exhibit list	1.00
8/2/79	Correspondence to all plaintiffs re: manda- tory settlement con- ference on 8/31/79	1.25
8/23/79	Reviewed file re: settlement	2.00
8/31/79	Preparation for set- tlement conference with plaintiffs re- sent, travel to and from Los Angeles and settlement conference	6.50
10/19/79	Conference (telephone) with Jerry Lopez re: settlement	.50

10/22/79	Travel to and from Los Angeles for settlement/ status conference	5.50
12/13/79	Travel to Los Angeles for conference with Jerry Lopes, entire case review	8.00
2/4/80	Preparation for status conference, status conference, travel to and from Los Angeles; conference with Jerry Lopez	7.75
2/28/80	Correspondence to Kotler re: supplemental pleadings	.25
3/8/80	Meeting with Jerry Lopez in Los Angeles re: trial preparation, travel to Los Angeles and return	7.00
3/10/80	Received and reviewed defendants memorandum of contentions of law and fact	3.25
3/11/80	Correspondence to all plaintiffs and witness re: meeting at Rivera residence and 3/25/80 trial date and schedule	1.25

3/15/80	9:00 a.m. to 5:00 p.m., trial preparation, preparation of subpoenas and proposed examination, review of Casa Blanca Report	7.00
3/17/80	Interview all witnesses and plaintiffs in preparation for trial, reviewed all depositions of plaintiffs and witness statements, travel to and from Riverside	10.50
3/18/80	3:00 p.m. to 7:30 p.m. trial preparation	4.50
3/21/80	Received minute order re-setting trial to June 3, 1980. 2:00 p.m. to 7:00 p.m. trial preparation, developed tentative order of proof, reviewed medical records and depositions on Manuel Flores and Jerome Rivera	.15 5.00
3/21/80	Received Minute Order continuing trial date	.10
5/9/80	Review of Police operating manuals re: use of force and tear gas, review of Casa Blanca Report	2.50

5/9/80	Organized and reviewed medical charts, psychiatric charts, 60 minute transcript and stipulations re: dismissal and discovery	1.75
6/16/80	Received and reviewed defendants' motion for trial date certain, memorandum of points and authorities	.50
7/19/80	Trial preparation; review old notes, investigator reports, photo and exhibits	5.00
7/26/80	Trail preparation; reviewed defendants memorandum of contentions of law and fact and exhibits	6.00
7/30/80	Received Notice of Continuance of trial date to 9/16/80	.15
8/1/80	Correspondence to all plaintiffs re: new trial date of September 16, 1980	.75
8/28/80	Received and review Ex Parte Motion to continue oral arguments on appeal in C.A. No. 78-3319; CV 78-2076	.25

9/6/80	<p>Review of answers to plaintiffs interrogatories, compared answers to answers to answers given in depositions, reviewed attorney Wallace Farrels trial notes re; crossexamination of defendant police officers during criminal trials, expanded on tentative cross-examination, reviewed police procedures manual, researched certification guidelines for use of tear gas under California Penal Code. 8:00 a.m. to 5:30 p.m.</p>	8.50
9/10/80	<p>5:00 a.m. to 9:00 a.m. legal research in preparation for trial, read major cases cited in contentions of law, 1:00 p.m. to 4:00 p.m.</p>	7.00
9/11/80	<p>Trial preparation, review of plaintiffs contentions of law and fact, defendants contention of law and fact, reviewed complaint and prepared outline of elements of each cause of action and supporting</p>	

	evidence and corroborating witnesses, reviewed jury instructions re: burden of proof and elements of each cause of action as against each defendant 1:00 p.m. to 8:00 p.m.	7.00
9/12/80	1:00 p.m. to 5:00 p.m. trial preparation, review of interrogatories answered by plaintiffs, compared to plaintiffs depositions, preparation of additional subpoenas, telephone conference with Lee Roy Rivera, witness coordinator	5.00
9/13/80	8:00 a.m. to 6:00 p.m., preparation of trial folder for each named plaintiff including City of Riverside and organization of cross-index to exhibits	10.00
9/14/80	9:00 a.m. to 5:00 p.m., preparation of exhibits, marking exhibits, preparation of outline of every police report obtained during discovery	8.00

9/15/80	Travel to Los Angeles from San Diego	2.50
	Trial preparation 10:00 a.m. to 5:00 p.m.	7.00
	Conference with Jerry Lopez, co-counsel, re: presentation of case and witnesses from 6:00 p.m. to 11:00 p.m., preparation of exhibits and opening statement	5.00
9/16/80	5:00 a.m. to 7:30 a.m. preparation for trial	2.50
	9:00 a.m. to 5:00 p.m. trial	7.50
	7:00 to 10:00 p.m. trial preparation	3.00
	Received and reviewed proposed Voir Dire submitted by plain- tiffs	.20
9/17/80	5:00 a.m. to 7:30 a.m. preparation for trial, review of statements of plaintiffs wit- nesses, review of clients depositions.	2.50
9/17/80	Trial from 9:00 a.m. to 5:00 p.m. Preparation for trial from 7:00 p.m. to 11:30 p.m., discus- sions with Jerry Lopez (co-Counsel) re: order of proof, elements of	7.50

	causes of action and potential dismissals	4.50
9/18/80	5:00 a.m. to 7:30 a.m., trial prepara- tion	2.50
	Trial from 9:00 a.m. to 4:00 p.m.	6.50
	7:00 p.m. to 11:00 p.m., review of police reports, inter-depart- ment communications, Riverside Police Department policy of batons, firearms, tear gas usage	4.00
9/19/80	5:00 a.m. to 7:30 a.m. preparation for trial, review of interroga- tories re: Chief Fer- guson	2.50
	Trial from 9:00 a.m. to 4:30 p.m.	7.00
	Travel from Los Ange- les to San Diego	2.00
9/20/80	Trial preparation, review of damages, review of police reports for purposes of cross-examination of defendant police officer 10:00 a.m. to 4:00 p.m.	6.00
9/22/80	Travel from San Diego to Los Angeles	2.00
	Trial time 9:00 to 5:00 p.m.	7.50



9/23/80	5:00 a.m. to 7:30 a.m. trial preparation review of depositions, review of interroga- tories and preparation of cross-examination	2.50
	Trial 9:00 a.m. to 5:00 p.m.	7.50
	6:30 to 11:30 p.m., trial preparation	5.00
9/24/80	Trial preparation 5:00 a.m. to 7:30 a.m.	2.50
	Trial time 9:00 a.m. to 5:00 p.m.	7.50
	Trial preparation and review of rebuttal evidence, preparation of additional jury instruction re: tear gas as dangerous instrumentality, research into impro- priety of dismissals of criminal charges predicated on Stipula- tions of probable cause for the court. 7:00 p.m. to 11:30 p.m.	4.50
9/25/80	4:30 a.m. to 7:30 a.m., preparation of final arguments, pre- paration of rebuttal testimony	3.00
	Trial from 9:00 a.m. to 3:30 p.m.	5.50

	7:00 p.m. to 11:00 p.m., preparation of final argument	4.00
9/26/80	4:00 a.m. to 8:30 a.m., review of trial notes, complaint and depositions in prepar- ation for final argu- ment	4.50
9/26/80	9:30 to 3:00 p.m. final argument and rebuttal, instruction to jury	5.00
	Travel from Los Ange- les to San Diego	2.00
9/29/80	Travel from San Diego to Los Angeles	2.00
	Standby for jury deli- beration 9:00 to 5:00 p.m.	7.00
9/30/80	Standby for jury deli- berations 9:00 a.m. to 5:00 p.m.	7.00
10/1/80	Standby for jury deli- berations 9:00 a.m. to 5:00 p.m.	7.00
10/2/80	Standby for jury deli- berations, responded to questions from jury 9:00 a.m. to 4:30 p.m.	6.50
10/3/80	Standby for jury deli- berations from 9:00 a.m. to 5:00 p.m.	7.00

	Travel from Los Angeles to San Diego	2.00
10/6/80	Travel from San Diego to Los Angeles	2.00
	Standby for jury deliberations 9:00 a.m. to 5:00 p.m.	7.00
10/7/80	9:00 a.m. to 3:00 p.m. waiting time for verdicts and reading of verdicts	4.00
11/28/80	Preparation of attorney fee request and affidavit	10.00

HOURS SUBMITTED BY GERALD P. LOPEZ

1975

Aug.	4.50
Sept.	15.50
Oct.	21.50
Nov.	23.50
Dec.	4.00

1976

Jan.	20.00
Feb.	13.00
Mar.	23.00
Apr.	24.50
May	7.50
June	4.75
July	15.00
Aug.	14.50
Sept.	11.75
Oct.	13.50
Nov.	13.50
Dec.	21.50

1977

Jan.	30.75
Feb.	34.50
Mar.	46.75
Apr.	22.75
May	14.00
June	33.00
July	37.25
Aug.	30.25
Sept.	55.25
Oct.	34.50
Nov.	11.75
Dec.	8.00

1978

Jan.	27.25
Feb.	16.50
Mar.	23.00
Apr.	15.50
May	52.25
June	16.75
July	13.50
Aug.	50.50
Sept.	20.00
Oct.	.25
Nov.	6.00
Dec.	18.50

1979

Jan.	60.50
Feb.	41.00
Mar.	33.50
Apr.	51.00
May	20.00
June	3.50
July	6.50
Aug.	0.00
Sept.	0.00
Oct.	0.50
Nov.	0.00
Dec.	10.50

1980

Jan.	0.00
Feb.	8.00
Mar.	29.25
Apr.	7.00
May	22.50
June	0.00
July	0.00
Aug.	3.00
Sept.	73.50
Oct.	0.00
Nov.	25.00
Dec.	

Total hours expended: 1,265.50

# COSTS INCURRED

10/31/75	Express Mail (2)	11.00
2/18/76	Randolph Levine	83.85
4/22/76	Susan Handler Menahem	160.00
4/23/76	Western Institute	100.00
4/26/76	Copy Shoppe	5.68
5/28/76	Copy Shoppe	10.92
6/3/76	Postmaster	5.50
6/7/76	U.S. District Court	15.00
6/21/76	Service (Robert Lopez)	100.00
7/13/76	Jerry Lopez (copy costs)	2.23
8/18/76	Jones, Cazares, Adler & Lopez (copies)	18.91
4/77	Phone Bill	3.13
5/77	Phone Bill	9.32
7/77	Phone Bill	6.20
7/14/77	Gerald P. Lopez	124.75
7/15/77	U.S. Postmaster	7.16
8/77	Phone Bill	8.75
8/11/77	Express Mail	5.50
9/77	Phone bill	2.51
9/6/77	Express Mail	5.50
9/8/77	Gerald P. Lopez travel expense	39.00
9/19/77	Express Mail	5.50
9/30/77	Gerald P. Lopez Travel expense	40.00
9/30/77	U.S. Postmaster	5.60
9/30/77	Express Mail	6.25
10/77	Phone bill	3.29
10/4/77	Hermand Alcantar Travel	31.80
10/11/77	Express Mail	7.50
10/19/77	Gerald P. Lopez travel	16.50
10/20/77	Bessie Smith, Notary	10.00
1/10/78	Gerald P. Lopez travel	25.00
1/4/78	Kaiser medical records	11.00
2/23/78	Jennie Rivera xeroxing	25.00

3/10/78	R. B. Cazares (depositions)	2.07
3/10/78	Gerald P. Lopez travel	25.00
3/15/78	M. Flores, doctors depositions	64.40
5/23/78	Insurance bond premium	20.00
5/23/78	Herman Alcantar (travel)	10.00
5/25/78	Jerald P. Lopez copy expense	8.41
5/25/78	U.S. District Court	15.00
5/30/78	Herman Alcantar (travel)	27.68
6/7/78	Jerald P. Lopez travel	30.00
6/8/78	Civil Clerk Superior Court filing fee	157.00
8/1/78	Herman Alcantar, mileage	20.80
8/9/78	We Copy	3.43
8/9/78	Postage	2.64
10/23/78	Ed Webster Subpoena	20.20
10/25/78	Herman Alcantar	56.20
10/27/78	Katherine A. Las, C.S.R.	95.00
11/8/78	Ed Webster Subpoena	20.20
11/8/78	Donald Innskeep Subpoena	20.20
11/29/78	Deposition of Ferguson travel	76.00
12/4/78	Deposition of Ferguson travel	4.00
12/29/78	Car Rental	18.46
1/30/79	Express Mail Service	7.50
1/31/79	Trip expenses	50.00
1/31/79	Acapulco Motor Hotel, L.A.	25.80
2/1/79	Anna M. Williams, C.S.R.	138.12
2/1/79	Bray & O'Daly, C.S.R.	98.68
2/1/79	Racklin, et al, C.S.R.	15.00
2/14/79	Fishburn typeing, pre-trial	150.00
3/1/79	Virginia A. Mejia, C.S.R.	229.58

3/1/79	Bor-Air Freight	65.00
4/6/79	Purolator Courier	7.75
5/2/79	Motel Riverside	15.90
5/31/79	Marvin Givant Attorney Service	25.00
6/14/79	Holdiay Inn	22.26
6/29/79	Advance Travel	28.00
7/2/79	Car Rental, Hertz	27.89
7/2/79	PSA	28.00
7/6/79	Bor Air Freight	94.45
7/19/79	Office Supply (appeal brief)	7.43
7/19/79	U.S. Postmaster (mailing appeal brief)	2.27
8/30/79	Roy B. Cazares travel	75.00
9/24/79	Marvin Givant attorney service	33.50
10/22/79	Amtrak	20.00
2/4/80	Amtrak	21.50
2/4/80	Expenses Roy B. Cazares	20.00
2/28/80	Postmaster Express Mail	7.50
3/17/80	Roy B. Cazares per diem, Mark Crowley	40.00
5/22/80	Roy B. Cazares travel	52.34
9/12/80	Roy B. Cazares per diem	100.00
9/16/80	Officer Robert Plaitt witness fees	48.00
9/29/80	Amtrak	23.00
9/30/80	Roy B. Cazares travel and per diem	100.00
10/31/80	Roy B. Cazares per diem for each day of trial, 17 days X \$50.00	<u>850.00</u>
TOTAL COSTS:		\$4,038.51



## APPENDIX 10

KOTLER & KOTLER  
JONATHAN KOTLER  
PATTI ANN KOTLER  
8500 Wilshire Blvd.  
Suite 903  
Beverly Hills, CA 90211  
(213) 652-6273  
Attorneys for Defendants

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,                    )  
  )  
          Plaintiffs,                        )  
  )  
CITY OF RIVERSIDE, et al.,                )  
  )  
          Defendants.                         )  
\_\_\_\_\_)

No. CV 76-1803 MRP  
Filed: January 7, 1981  
Clerk, U.S. District Court  
Central District of California

**DEFENDANTS' MEMORANDUM OF POINTS  
AND AUTHORITIES AND DECLARATION  
OF JONATHAN KOTLER IN SUPPORT  
THEREOF IN RESPONSE TO MOTION BY  
PLAINTIFFS FOR ATTORNEYS FEES AND  
COSTS.**

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AFFIDAVIT OF JONATHAN KOTLER

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
CITY OF RIVERSIDE, et al.,	)
	)
Defendants.	)
<hr/>	

No. CV 76-1803 MRP

DEFENDANTS' MEMORANDUM OF POINTS  
AND AUTHORITIES AND DECLARATION  
OF JONATHAN KOTLER IN SUPPORT  
THEREOF IN RESPONSE TO MOTION BY  
PLAINTIFFS FOR ATTORNEYS FEES AND  
COSTS.

**MEMORANDUM OF POINTS  
AND AUTHORITIES**

**INTRODUCTION**

On October 7, 1980, the jury, in the above-entitled matter awarded Plaintiffs judgment in the total amount of \$33,350.00--a sum that represented only a small fraction of the multi-million dollar recovery originally sought by Plaintiffs herein. Subsequent questions by a Los Angeles Times reporter (See 'Latinos, Police Both Claim Victories in Riverside Suit,' Los Angeles Times CC Part II 1,6 (Nov. 16, 1980) attached hereto as Exhibit "A" and incorporated herein by this reference as though set forth verbatim hereat) revealed that the jury foreman, Rene Wong, said: "We wanted

the Riveras [Plaintiffs] to get something for putting up with the case for five years. But we didn't see any strong evidence to tell us to give them a whole lot of money, either." Mrs. Wong indicated to the Times reporter that "The jury had no idea the Latinos had sued for such a large sum in damages."

After the verdicts were read by the Court, counsel for Plaintiffs said: "On behalf of the Plaintiffs and their counsel, we will be making a motion for attorneys fees and perhaps a motion for additur." (See Reporter's Transcript p. 3 ll. 16-18 attached hereto as Exhibit "B" and incorporated herein as though set forth verbatim hereat.)

Prior to any such motions being filed, the Court informed Defendants' counsel that: "Now, the only thing I tell you Mr. Kotler, is that he [Plaintiffs' counsel] is going to get substantial attorneys fees, because this is a lot of time we're talking about." The Court continued, (R.T. p. 6 ll. 5-9) "My disposition now, so that you would be aware of it, is that I would give Mr. Cazares the attorney's fees that cover everything that he did that's legitimate so that the burden of the attorney's fees does not fall on the parties." The Court concluded (R.T. p. 6, ll. 23-25, p. 7, l. 1) "And the final thing I say is that I have no quarrel with the quality of what he did. So if I have no quarrel

with the quality and he gives me the hours, I will compensate him. And you'll [Mr. Cazares] have to tell me the rate."

On December 5, 1980, Plaintiffs' counsel filed their motion for attorneys fees and costs. They did not file a motion for additur, which might have gotten more money for their clients but rather, merely filed a self-serving motion for attorneys fees. The motion for attorneys fees appears to be a brazen attempt to obtain from the Court as attorneys fees 16 times the amount awarded to the Plaintiffs by the triers of fact--the jury.

Plaintiffs' last non-negotiable demand was for the sum of \$320,000.00. The total amount of

judgment awarded in this case, however, was approximately 10% of that amount, the sum of only \$33,350.00. Only six of the original 32 Defendants have had verdicts rendered against them by the jury. Eighteen of these Defendants were dismissed earlier in this case after motions for summary judgment, the Court finding that there was no triable issue of fact against any of them as to any claim pleaded by Plaintiffs.

This case did not involve a class action. Rather, eight citizens of the City of Riverside recovered amounts varying from \$8,500.00 to \$700.00. No injunctive or declaratory relief was requested or awarded at time of trial, although such

relief had been sought by the Complaint filed herein. No policy changes of Defendant Riverside Police Department have been requested or made as a result of this trial, although, again, such was sought by the Complaint, though later dropped. Therefore, this litigation has in no way resulted in any long-range benefit for the community.

At no time during the trial did Plaintiffs' counsel attempt to vindicate the rights of an "oppressed minority." Plaintiffs in this case were middle class, fully employed, members of the Riverside community. At no time during the trial did the Plaintiffs claim that they had suffered discrimination on the basis of



their race, color, or creed. This claim too, had been raised by the Complaint filed by Plaintiffs, and like the above-referenced claims, dropped by the time of the pretrial for lack of evidence.

Plaintiffs' attorneys have now petitioned this Honorable Court for fees which amount to nearly a half million dollars, or sixteen times the total amount of the jury award. Defendants respectfully contend that such a request is not only unreasonable, but is unconscionable under the circumstances of this case. It is a bold attempt by counsel to reap their own benefits from the case--and nothing more.

## POINTS AND AUTHORITIES

1.

ATTORNEYS' FEES WHEN REQUESTED,  
MUST BE REASONABLE.

"Courts must remember that they do not have a mandate . . . to make the prevailing counsel rich." *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974).

In discussing the statute authorizing attorneys' fee awards in an equal employment opportunity case, the Fifth Circuit found that the statute was not passed for the benefit of attorneys, but rather to enable litigants to obtain competent counsel worthy of contest with the caliber of counsel available to their opposition and to fairly place the economic burden of such litigation. *Johnson, supra*, at 719.

Johnson is quoted in *McPherson v. School District #186, Springfield, Illinois*, 465 F. Supp. 749, 756 (S.D. Ill. 1978) wherein the Court observed that:

"The Court in *Johnson* cogently states that there is no duty to make counsel for prevailing party rich. These standards were not passed for the benefit of attorneys, but to enable litigants to obtain counsel to preserve rights secured by the Constitution or Laws of the United States."

In *Keyes v. School Dist. No. 1, Denver, Colo.*, 439 F. Supp. 393 (D. Colo. 1977), another civil rights case, the court outlined a "preferable method of computing an hourly figure for compensation." The method employed "is to consider all the factors . . . , and then arrive at an hourly rate or other figure which will represent fair and reasonable compensation, compatible to that which

might be received in commercial litigation." **Keyes, supra**, at 413.

The **Keyes** Court also indicated that in computing attorneys fees awards in civil rights cases that,

"several courts have taken into account payments authorized under the Criminal Justice Act, 18 USC §3006 A(d) for compensation to attorneys who represent indigent defendants in criminal cases. **E.E.O.C. v. Enterprise Ass'n. Steamfitters Local 638**, 542 F.2d 579, 593 n.12 (2nd Cir. 1976); **Panior v. Iberville Parish School Bd.**, 543 F.2d 1117, 1119 n.6 (5th Cir. 1976); **Knight v. Auciello**, 453 F.2d 852 (1st Cir. 1972); **Thompson v. School Bd.**, 363 F.Supp. 458, 465 (E.D. Va. 1973). The current authorization under the Act is generally \$30.00 per hour for in-court service and \$20.00 per hour for out-of-court time." **Keyes, supra**, at 414.

In **Scott v. Bradley**, 455 F.Supp. 672 (E.D. Va. 1978), an employment discrimination case, attorneys fees in the amount of one-third of the recovery were

found to be adequate. The Scott court acknowledged the primary purpose behind the Civil Rights Attorneys Fees Award Act was to encourage lawyers to represent persons in the civil rights field; however, the court concluded:

"A one-third contingent fee in the field of personal injury has proved most efficacious in encouraging counsel to represent injured plaintiffs in even the marginal cases of doubtful liability and transitory injury. There is no reason to believe similar awards where compensatory damages, as here, are substantial, would not have the same effect in civil rights cases." Scott, *supra*, at 673.

The Court went on: "[E]ven without such protective legislation lawyers have been massively encouraged to enter the personal injury field upon the expectation of being compensated on a contingent fee basis." Scott, *supra*, at 674.

In **Scott** the Plaintiff was awarded compensatory damages in the amount of \$4,350.00.

"The Court recognizes that many types of civil rights cases do not result in any monetary reward and others result in only minimal monetary awards. Obviously, in such cases, a percentage fee would be inappropriate. This is not such a case, however, and the Court need not base a fee determination on conditions contrary to fact." **Scott, supra**, at 674.

In the case at hand one-third of the \$33,350.00 award received by Plaintiffs is not a half-million dollars. Based on the **Scott** guidelines, there is no reason to provide an economic windfall to Plaintiffs' counsel by awarding them sixteen times the award received by Plaintiffs in the instant action.

The **Scott** court continues at 675:

"The Court must also bear in mind that while lawyers are to be

encouraged to accept civil rights cases they should not be encouraged to take over the cases . . . . Had the court awarded the sum sought the case would have been the lawyer's case with the client as an appendage . . . . The lawyer cannot be permitted to subsume the case."

Scott continues, "the amount of the verdict is often a good indicator of the reasonableness of the time expended and fee to be awarded." *Scott, supra*, at 675.

The *Scott* court could well have had the instant case in mind when warning that civil rights attorneys should be encouraged to represent plaintiffs, but should not be encouraged to over-prepare the case. According to the affidavit submitted by Gerald P. Lopez with the motion for attorneys fees, during the month of September 1980, he expended 73.5 hours, though he fails to indicate



by breakdown how these hours were spent. The Court is asked to recall pages of jury instructions prepared by Mr. Lopez, and tossed aside by the Court, who indicated that Mr. Lopez's instructions would be unintelligible to the average juror. *Scott, supra*, at 674, reminds us that "[s]erious criminal offenses often draw fines of lesser magnitude than the aggregate of payments to be required of defendants in Plaintiffs' proposal. Though a civil rights violation is a serious offense, it is, after all, a civil offense, not crime."



2.

DETERMINATION OF LODESTAR

In *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d at 70, the Ninth Circuit adopted the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), as appropriate guidelines which courts should consider in determining reasonable attorneys fees. The twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), are:

1. The time and labor required;
2. The novelty and difficulty of the questions;
3. The skill requisite to perform the legal service properly;

4. The preclusion of other employment due to acceptance of the case;
5. The customary fee;
6. The contingent or fixed nature of the fee;
7. The time limitations imposed by the client or the case;
8. The amount involved and the results obtained;
9. The experience, reputation, and ability of the attorneys;
10. The undesirability of the case;
11. The nature of the professional relationship with the client; and,
12. Awards in similar cases.

Each of the foregoing factors will be examined in an attempt to assist the

Court in its determination of what is a reasonable fee in this case.

A. THE TIME AND LABOR SPENT  
MUST BE REASONABLE.

The Court must first consider whether it was reasonable for Plaintiffs in this case to obtain out-of-the-area counsel (Mr. Cazares) when it was obvious that every time he had to investigate or appear in court there would be at least five hours of travel time involved.

In *McPherson v. School District #186*, Springfield, Illinois, 465 F.Supp. 749 (S.D. Ill. 1978), the Court made such an inquiry. In that case, as in the one at hand, it had not been shown whether any local attorney of comparable ability would have accepted the case.

In the case at hand, both counsel from San Diego (Mr. Cazares) and from Los Angeles (Mr. Lopez), were retained by Plaintiffs. However, time and time again the San Diego counsel made appearances in Los Angeles, while there was no explanation offered by Plaintiffs' counsel as to why it would not have been less costly and more appropriate for the Los Angeles counsel to have made the same appearance instead. One example as indicated in the hours submitted by Roy B. Cazares, are those hours from 9/29/80 until 10/7/80, comprising over fifty hours, during which time Mr. Cazres "stood by" for jury deliberations after traveling from San Diego to Los Angeles (sometimes daily). No indication has been made by counsel for Plaintiffs herein why it was necessary for Mr.

Cazares to spend this time, rather than have Mr. Lopez, who was already in Los Angeles during that time period, available as the "stand by" during that time period. Defense counsel whose office is in Beverly Hills, were on 30-minute notice from the Court. There has been no explanation of why Mr. Lopez could not similarly have been on 30-minute notice from Court, rather than requiring Mr. Cazares to camp-out for over a week on a full-time basis in Los Angeles awaiting the verdict.

Granted that when the witnesses are located in Riverside and the court in Los Angeles, there will obviously be a certain amount of travel time required of all counsel. The point, however, is that had Plaintiffs been paying an hourly fee to their counsel it is likely

that counsel would have been required to make a more judicious allocation of labor between the two co-counsel (the Los Angeles counsel and the San Diego counsel) to prevent the travel time aspect from getting economically out of proportion, as here.

In *McPherson*, *supra*, at 758, Judge Ackerman points out:

"In my opinion time spent traveling should not be compensated at the same hourly rate as office or court time. Efficiency is decreased and many times the circumstances allow little, if any productive effort."

Judge Ackerman consequently reduced the hourly rate he found reasonable for attorneys for travel time.

In *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714, 717 (6th Cir. 1978) the court found it incumbent to

make a detailed analysis of how the attorney's time was spent:

"I do not believe that attorneys should receive the same hourly rate, as was allowed here, for every type of service which they perform. Thus, for example, time spent traveling should not be compensated at the same hourly rate as time spent in court, or time spent in the office looking up law, or talking on the telephone."

In *McManama v. Lukhardt*, 464 F.Supp. 38 (W.D. Va. 1978), a class action civil rights suit, the court came to the conclusion that a lower rate must also be applied to hours spent on research, drafting, and other preparation, than for time that is actually spent in court. *McManama, supra*, at 43.

Thus, what is being respectfully suggested is that both the number of hours allowed by this Court and the rate



at which the allowable hours are compensated, should be closely scrutinized and greatly reduced by this Honorable Court.

B. FEE-PETITIONERS HAVE FAILED TO SHOW THAT THE QUESTIONS PRESENTED BY THIS CASE ARE EXCEPTIONALLY NOVEL OR DIFFICULT.

A second factor suggested by *Johnson v. Georgia Highway Express, Inc., supra*, is to look to the novelty and difficulty of the questions presented.

As the Court is well aware, this is hardly the first civil rights 1983 action brought on the basis of state torts which has come before this or other courts. Fee-petitioners did not suggest any novel approach to the law, unless one could consider novel the fact that they suggested many unsuccessful avenues of recovery, most of which were



dropped by the time of the pretrial after spending literally hundreds of hours on them--of Plaintiffs' counsel, defense counsel, and the Court. An attempt to support claims which have no basis in law or fact in this day of crowded dockets, can hardly be considered novel and thereby support additional amounts in fee awards. It is submitted that Plaintiffs have in no way prevailed on any type of novel theory in this case--let alone gone to the jury on any such theory.

The questions raised by this case were relatively simple. This was not a case of first impression. It did not involve complex anti-trust issues. It was not even a class action. It merely involved interpretation of constitutional law and tort law issues which

courts and attorneys have been analysing throughout the history of our judicial system. Perhaps the only difficult question of this case is the one before the Court at this point; whether the award of shocking attorneys fees can be justified is a case of minimal jury verdicts on a very small percentage of the claims pleaded, and against a very few defendants sued.

C. FEE-PETITIONERS HAVE SHOWN THAT NO EXCEPTIONAL SKILL WAS REQUIRED TO PERFORM THE LEGAL SERVICES RENDERED HEREIN.

The next factor listed in *Johnson v. Georgia Highway Express, Inc.*, is the skill requisite to perform the legal services properly. Unlike many civil rights actions, where counsel are called upon to create consent decrees, and

otherwise devise innovative methods of resolving the issues, here all that was required was standard trial court skills--nothing more exceptional than would have been necessary for the most mundane of personal injury suits. The Court is asked to look at the results obtained by counsel in the Court's analysis of the skills displayed. A multi-million dollar prayer--a three hundred twenty thousand non-negotiable demand--and a thirty-three thousand dollar recovery.

D.    THERE HAS BEEN NO PRECLUSION  
      OF OTHER EMPLOYMENT DUE TO  
      THE ACCEPTANCE OF THIS CASE.

The fourth *Johnson v. Georgia Highway Express, Inc.*, factor is the preclusion of other employment due to acceptance of the case. Here the practice of each of

the co-counsel will be examined individually.

According to Mr. Lopez's own affidavit attached to the motion for fees, he is a full-time university professor at U.C.L.A. Not only has he been able to continue his other employment, but, according to 3 U.C.L.A Law 15, Spring 1980, attached hereto as Exhibit "C" and incorporated herein by reference as though set forth verbatim hereat, Mr. Lopez, has received time and funding to study the exact same statute at issue in this case. Thus, we submit, Mr. Lopez has hardly been precluded from other employment due to the acceptance of this case, but rather has made this case one of the focal points of his other employment, for which, presumably, he has been fully compensated.

For many months this case has required of Roy Cazares no more than an hour or two per week of his attention. If one scrutinizes his affidavit carefully, it is easy to see that during 45 months of this 63 month case, he has spent less than two hours per week on this matter. Thus, while it appears from the general numbers that this case had a "life" of more than five years, such a figure is quite misleading in that for several months no work was done at all on this case, and during many other months no more than eight hours of Mr. Cazares' time per month were consumed by this case. Therefore, except for the time that was spent in trial, it seems that Mr. Cazares has hardly been precluded from accepting other employment. The post-trial time, as discussed above, to

a certain extent, might well have been self-imposed preclusion of other employment due to the decision among co-counsel to have Mr. Cazares stand-by in Los Angeles for a week, rather than have Mr. Lopez, who was already in Los Angeles during that time period, remain on call.

E. THE COURT MUST EVALUATE  
COUNSELS' CUSTOMARY FEE.

**Preston v. Mandeville**, 451 F.Supp. 617 (S.D. Alabama 1978), a class action for contempt for failing to abide by a 1975 decree requiring adoption of random jury selection system, construed **Johnson v. Georgia Highway Express, Inc.**, to set forth the following guidelines on fees: "What is needed is the customary fee charged by these particular lawyers." **Preston**, *supra*, at 621. Thus, while the

petitioners suggest an hourly rate in the Los Angeles area of \$150.00 per hour, at no point do they inform the Court what their hourly rate is.

Moreover, where time is logged over a period of years, the rate must be based on the attorney's rate for each year, not just the 1980 rate in Los Angeles. Thus, while the fee-petitioners implied in their motion that the Court should consider inflation as a factor in setting their rate, they can hardly rightfully request that the Court both allow for inflation and base the hourly rate on 1980 dollars. As *Imprisoned Citizens Union v. Shapp*, 473 F.Supp. 1017 (E.D. Pa. 1979), sets forth, an attorney cannot be compensated at 1980 rates for hours logged over a five-year period; compensation must be apportioned over



that time, at the rates normally charged during the period in which the work was performed.

In *Heigler v. Gatter*, 463 F.Supp. 802 (E.D. Pa 1978), a civil rights action against city police officers in which \$11,566.00 was awarded to plaintiff on the basis of claims made for \$1983, false arrest and imprisonment, assault, and battery, the court first computed the rate for counsel at \$50.00 per hour for non-trial time, and \$75.00 per hour for trial time, and then looked to the number of hours requested. The court acknowledged in that case, as in the one at hand, that where the time period consumed by the action is particularly long due to court scheduling difficulties, the plaintiffs' attorney is not entitled to additional fees. In our



case, as the Court is well aware, counsel have been ready to go to trial for 28 months, although due to the court's crowded schedule, the trial scheduled originally for April 17, 1979, did not finally take place until late September 1980. Thus based on *Heigler, supra*, at 804, the long time span, over which this action continued--and was continued--was "primarily a function of scheduling difficulties rather than the complexity of the case," and does not form the basis for an award of additional attorneys fees.

F. THE CONTINGENT NATURE OF THE FEE DOES NOT NECESSARILY ENTITLE FEE-PETITIONER TO CARTE BLANCHE IN HIS AWARD.

While *Johnson v. Georgia Highway Express, Inc.* suggests that the court

look to the contingent or fixed nature of the fee, this, in and of itself, is not determinative of the fee award issue. This aspect will be discussed in more detail below.

G. THERE WERE NO EXCEPTIONAL  
TIME LIMITATIONS IMPOSED BY  
THE CLIENT OR THE CASE.

Johnson v. Georgia Highway Express, Inc., suggests that time limitations imposed by the client or the case should be a factor the court should consider in awarding fees. The fee-petitioners in this case were never under the eleventh-hour gun on this case in that they were present within three weeks after the incident. They have had ample time throughout this litigation to carefully draft all of their pleadings and perform all discovery they felt necessary. The

fee-petitioners were never in the position of picking up another attorneys scattered files two weeks before time of trial. They were never in a rush to avoid a statute of limitations deadline, and they could in all instances prepare their pleadings and schedule discovery in manner compatible with their calendars.

H. THE AMOUNT INVOLVED AND THE RESULTS OBTAINED REQUIRE A GREATLY DIMINISHED FEE AWARD THAN THAT SOUGHT.

As discussed above, there was a multi-million dollar prayer in this action. The fee-petitioners, however, only obtained thirty-three thousand dollars for their clients. This amount was little more than eight thousand dollars more than the last settlement

offer made by Defendants (see affidavit of Jonathan Kotler filed herewith and incorporated herein by reference as though set forth verbatim herein). The fee-petitioners have relied heavily on the recent case of **Keith v. Volpe**, 86 F.R.D. 565 (C.D. Ca. 1980). This case involved a class action in a successful challenge to the Los Angeles Century Freeway project which resulted in the project's compliance with federal and state laws as well as affirmative action on housing programs. Counsel in **Keith** were able to negotiate a settlement to provide for minorities to be given certain preferential employment in the 20,000-man project that called for 4,200 units of low and moderate income housing with an estimated value of two hundred-fifty million dollars, thereby conferring

"substantial tangible benefits, both pecuniary and non-pecuniary, on the State of California and its inhabitants." Keith, *supra*, at 572. The counsel in Keith negotiated a final consent decree which set forth "a complex, but innovative settlement that promises to benefit the entire Southern California community for many years to come." Keith, *supra*, at 568. Keith is not talking about benefits to eight individuals in the amount of \$33,350.00. That fee-petitioners in the instant action should analogize their case to Keith seems at once pretentious, preposterous, and totally misleading.

I. THE EXPERIENCE, REPUTATION,  
AND ABILITY OF FEE-PETI-  
TIONERS HAS NOT BEEN SHOWN  
TO BE OUTSTANDING

Unlike Keith where plaintiffs' counsel "provided first-rate legal services in successfully advocating the protection of the enviromental and human interest at stake in this lawsuit involving 1.5 billion dollar freeway construction project," the counsel in the instant case had only just begun practice when they began representing these eight Plaintiffs. Gerald Lopez had only been out of law school for one year, and Roy Cazares for only two years. In May of 1975, according to the affidavit of Mr. Cazares attached to the instant motion, he and Mr. Lopez started in private practice together. This was only three months before they were retained by the

Plaintiffs herein. Mr. Cazares's affidavit indicates that he has been involved with considerable litigation and civic activities over the past six years. (Apparently the instant case did not preclude Mr. Cazares in any way from other employment.) While it is not the intent of this Response to denigrate Mr. Cazares's civic involvement, such involvement does not in any way indicate a special expertise in the field of civil rights.

Mr. Lopez, on the other hand, has offered us no information whatsoever regarding his experience, reputation or ability. Moreover, Mr. Lopez refers to the "litigious nature of defendants" (see affidavit of Gerald P. Lopez, page 4, line 7). The Court's attention is drawn to this remark to point out that



this is perhaps the first time it has ever been suggested that a defendant is litigious, as opposed to a plaintiff. As the Court is no doubt aware, Defendants in this suit did not seek this litigation, but Defense counsel would be doing disservice to their clients if they remained passive and acquiesced to fee-petitioners' demands without a whimper. That Defendants, and not Plaintiffs, prevailed on the overwhelming majority of plaintiffs' original demands speaks more eloquently than anything else of the "litigious" nature of parties herein.



J. FEE-PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THIS PARTICULAR CASE WAS "UNDESIRABLE".

Another of Johnson v. Georgia Highway Express, Inc.'s twelve factors is the undesirability of the case. Referring to the affidavit of Gerald P. Lopez submitted with the instant motion on page 2, line 25, Mr. Lopez submits to the Court the fact that he teaches courses devoted exclusively to civil rights legislation and teaches a civil rights litigation seminar. Based on this fact, the case at hand can hardly be said to be "undesirable" to Mr. Lopez. On the contrary, this is precisely the type of case which, to Mr. Lopez, should be the most desirable. Similarly, Roy Cazares also represents himself to have a "general practice with

a strong emphasis on civil rights" (see affidavit of Roy B. Cazares attached to the instant motion, page 3, line 21). Unlike the pioneering attorneys who initially risked their practices to represent the indigent and the downtrodden, Messrs. Cazares and Lopez have in fact built their practice on representing plaintiffs in civil rights cases. As discussed earlier, Plaintiffs in this case were neither disenfranchised immigrant workers, nor prisoners without access to law libraries, nor students deprived of decent education, nor families denied adequate housing. Rather, these Plaintiffs were fully employed, middle-class home owners and residents in the City of Riverside. Fee-petitioners herein have made some attempt by innuendo to change the character of

Plaintiffs herein as it suits their need. During the time of trial the Plaintiffs were characterized as middle-class, law-abiding property owners. Now, for the purposes of obtaining fee awards, the fee-petitioners have implied that Plaintiffs are the meek and down-trodden. The jury by limiting its verdict to \$33,350.00 in a purportedly multi-million dollar case has indicated how it characterizes the Plaintiffs herein.

The Court is no doubt aware of the press coverage and publicity given to the instant action. Needless to say, such "free advertising" hardly makes this case undesirable, especially for attorneys who purportedly specialize in civil rights litigation. (See Los Angeles Times article dated November 16,

1980, previously referred to herein and attached hereto as Exhibit "A" and incorporated by reference as though set forth verbatim). In this article Mr. Cazares was specifically identified by name and quoted about this case.

K. FEE-PETITIONERS HAVE FAILED TO GIVE ANY GUIDELINES TO THE COURT REGARDING THEIR PROFESSIONAL RELATIONSHIP WITH THEIR CLIENTS.

Johnson v. Georgia Highway Express, Inc. suggests that one other factor to consider in the award of attorneys fees is the nature of the professional relationship with the client. Fee-petitioners have offered absolutely no guideline whatsoever to the Court regarding the professional relationship they have with their clients. There has been no suggestion as to whether they have an on-

going relationship, or whether they had not represented these clients before.

**L. THE COURT MUST LOOK AT AWARDS IN SIMILAR CASES.**

In looking to fee awards in other public interest cases, *Keyes v. School Dist. No. 1, Denver, Colo.*, 439 F.Supp. 393, 413, (D. Colo. 1977), supplied a list of fees which had been awarded in civil rights litigation:

"\$5.00/hour--*Spero v. Abbott Laboratories*, 396 F.Supp. 321 (N.D. Ill. 1975)  
\$12.00/hour--*Brito v. Zia*, 478 F.2d 1200 (10th Cir. 1973)  
\$14.00/hour--*Peltier v. City of Fargo*, 533 F.2d 374 (8th Cir. 1976)  
\$22.10/hour--*Davis v. Board of School Commissioners*, 526 F.2d 865 (5th Cir. 1976)  
\$20.00/hour for office work,  
\$30.00/hour for court work--*Wyatt v. Stickney*, 344 F.Supp. 387 (M.D. Ala. 1972); *Thompson v. School Board*, 363 F.Supp. 458 (E.D. Va. 1973), *aff'd*, 498 F.2d 195 (4th Cir. 1974).

\$20.00/hour for office work,  
\$40.00/hour for court work--**Lat-  
ham v. Chandler**, 406 F.Supp. 754  
(N.D. Miss. 1976).

\$30.00/hour average, \$50.00/hour  
for appeal to United States  
Supreme Court--**Norwood v. Harri-  
son**, 410 F.Supp. 133 (N.D. Miss.  
1976).

\$50.00/hour--**Stanford Daily v.  
Zurcher**, 64 F.R.D. 680 (N.D. Ca.  
1974); **Wallace v. House**, 377  
F.Supp. 1192 (W.D. La. 1974).

\$50.00 to \$70.00/hour depending  
upon experience--**Torres v. Sachs**,  
69 F.R.D. 343 (S.D. N.Y. 1975),  
aff'd, 538 F.2d 10 (2d Cir.  
1976).

\$64.80/hour--**Swann v. Charlotte  
Mecklenburg Bd. of Education**, 66  
F.R.D. 483 (W.D.N. C. 1975).

\$65.00/hour--**Davis v. County of  
Los Angeles**, 8 E.P.D. \$9444 (C.D.  
Cal. 1974).

3.

FEE-PETITIONERS REQUEST FOR COM-  
PENSATION IS DEFECTIVE IN FORM IN  
THAT HOURS AND RATES ARE NOT  
ITEMIZED.

The itemization of hours and specifi-  
cation of the rates submitted by Mr.  
Lopez was not done in his affidavit.  
According to **Keown v. Storti**, 456

F.Supp. 232 (E.D. Pa. 1978), such a defect must be remedied. When Mr. Lopez cures this defect however, *Heigler v. Gatter*, 463 F.Supp. 802 (E.D. Pa. 1978), requires that any figure that Mr. Lopez reconstructs is suspect and must be reduced approximately 20 percent because of his failure to keep contemporaneous time records.

4.

ONLY SERVICES RENDERED FOR THIS PARTICULAR CASE SHOULD BE COMPENSABLE.

As this Honorable Court may be aware, there is currently pending a separate lawsuit filed by eighteen of the original Defendants, who were dismissed from the instant action, against Plaintiffs. (*Albee v. Rivera* C.A. No. 78-3319 D.C. No. 78-2076, United States



Court of Appeals for the Ninth Circuit.) That is a different case originally brought in the state court for malicious prosecution. Any fees counsel charged for defense of that proceeding which were included in the award presently sought, would be for fees not for services rendered in this case, and therefore, are not compensable by this motion. From the face of the affidavits of Mr. Lopez and Mr. Cazares, it is not apparent how much of the time spent by counsel was connected with the Albee case. According to **Keown v. Storti**, 456 F.Supp. 232 (E.D. Pa. 1978), time spent by counsel on this related Albee matter must be subtracted from the time requested in the instant motion.



5.

ANY ATTORNEYS FEES AWARDED MUST  
BE PROPORTIONATE TO THE RECOVERY  
IN THE UNDERLYING SUIT.

Originally these eight Plaintiffs had presented six separate claims against 32 Defendants, for a total of 1,536 claims. The jury, however, provided recovery on only 37 of these 1,536 claims. Any fees awarded must take into account this disparity. In *Scheriff v. Beck*, 452 F.Supp. 1254 (D. Colo. 1978), a civil rights action, the court concluded that where plaintiff prevailed in his civil rights action against one defendant but did not prevail with respect to another defendant, the civil rights statute permitted fees to be awarded, but only as to sums reasonably expended against the defendant over whom plaintiff

prevailed. In *Scheriff, supra*, at 1259, the court suggested:

"Where, as here, plaintiff prevailed as to only one of the two defendants and has demonstrated no way in which to apportion his time, the court will simply cut the fee request by one-half."

The *Scheriff* court then looked to Plaintiff's success on his three separate claims and observed that he had recovered on only one. As a result, the court reasoned, "any recovery should take into account this disparity." *Scheriff, supra*, at 1259. The *Scheriff* court concluded at 1260 in this case however, that,

"While we would normally apply the proportionate recovery rule, we need not do so here. In this case, in the exercise of our discretion, the court has decided to withhold any award of fees in favor of plaintiff. . . . It is recognized that in some cases, while a plaintiff may sustain his claim of civil rights violations,

an attorney's fee award is simply not appropriate. Such a case was **Sprogis v. United Airlines, Inc.**, 517 F.2d 387 (7th Cir. 1975). There plaintiff obstentiously brought suit against the airline for violation of Title VII, 42 U.S.C. §2000e et seq., through the employers no marriage rule. The District Court had awarded plaintiff \$10,408.00 and thereafter, plaintiff filed an application for \$45,000.00 in attorney's fees. The court denied the application on a variety of grounds, including the fact that plaintiff was not the real party in interest (the real party having already reached a "class-action accord" with the , airline), that the precedential value of the suit was limited, that the suit was not of the type envisioned by Congress in passing the underlying legislation, and that the claim for fees was not proportionate to the recovery." (emphasis added.)

The Scheriff court was outraged by the disparity between the fee request and the amount of recovery: plaintiff's fee and cost request was some 40 times the amount of his recovery. Based upon the facts in Scheriff the court denied the

plaintiff's motion for an award of any fees and costs. In the within case, fee-petitioners are seeking an award nearly 16 times the amount of the jury award to the plaintiffs.

Similarly, the court in **Keown v. Storti**, 456 F.Supp. 232 (E.D. Pa. 1978), limited the amount of an attorneys fees award to plaintiff to the extent that he was successful in asserting his claims. **Keown** held further that for the purposes of fees act, defendants who successfully defend all claims asserted against them are "prevailing parties" and are therefore entitled to fees. **Keown**, supra, at 243.

In **Keyes v. School Dist. No. 1, Denver, Colo.**, 439 F.Supp. 393 (D. Colo. 1977), plaintiffs and intervenors sought fees, costs, and expenses as prevailing

parties. The court addressed this specific issue, and concluded that the award should be limited to the extent to which Plaintiffs and intervenors actually prevailed in litigation.

"Some courts have discounted requests for attorneys' fees by an amount comparable to the extent to which parties did not prevail. E.g. *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 (9th Cir. 1972); *Armstead v. Starkville Mun. Sep. School Dist.*, 395 F.Supp. 304, 312 (N.D. Miss. 1976); *Chance v. Board of Examiners*, 70 F.R.D. 334 (S.D. N.Y. 1976). While certain jurisdictions have rejected this position *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Calif. 1974), the Tenth Circuit has adhered to the reduction rule. In *Pearson v. Western Electric Co.*, 542 F.2d 1150, 1153, (10th Cir. 1976), the court stated: 'It is only when a party has prevailed in a court action that he may be entitled to attorney's fees proportionate to the extent of his recovery.' *Williams v. General Foods, Corp.*, 492 F.2d 399, 409 (7th Cir. 1974); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 (9th Cir. 1972).' (emphasis added).

Thus, we are of the view that attorneys fees should be awarded to plaintiffs and intervenors but that awards should be limited to the extent to which they prevailed in this litigation."

In **Keyes** the court found that the intervenors and plaintiffs prevailed to an extent of 85% of the recovery requested by them, and accordingly, after determining an appropriate fee, the award to the intervenors and plaintiffs was reduced by 15%.

In cognizance of Chief Judge Seitz' admonition in **Hughes v. Repko**, 578 F.2d at 486 against the use of an automatic fractional reduction of the lodestar, Joseph S. Lord, Chief Judge nonetheless, hand no choice but to decrease the award by the percentage plaintiff lost claims in **Imprisoned Citizens Union v. Shapp**, 473 F.Supp. 1017 (E.D. Pa. 1979),



because fee petitioning counsel failed to give any guideline as to what portion of their time was spent on compensable, prevailing, issues.

6.

USE OF A "MULTIPLIER" OR A  
"BONUS" ~~IS NOT~~ MERITED.

In *Heigler v. Gatter*, 463 F.Supp. 802 (E.D. Pa. 1978), the District Court held that plaintiffs counsel was entitled to a fee award of \$5,725.00, computed at a rate of \$50.00 per hour for non-trial time and \$75.00 per hour for trial time, in addition to \$523.40 for unreimbursed costs. This award was following successful civil rights litigation against two city police officers in which \$11,566.00 was awarded to plaintiffs. Plaintiff, an individual, brought the

action under 42 U.S.C. 1983 and alleged pendent state claims for false arrest and imprisonment, assault, battery, and malicious prosecution. The Heigler court found that "Plaintiff's counsel conducted the case in a competent manner worthy of someone with his skill and experience. These factors were adequately compensated in considering a reasonable hourly rate and there was not unusual performance justifying an increase in this case." Heigler, *supra*, at 805.

The court reached its decision upon the theory that "any addition to or subtraction from the lodestar to account for the quality of an attorney's work 'is designed to take account for an unusual degree of skill, be it unusually poor or unusually good.'" *Baughman v.*



Wilson Freight Forwarding Company, 583 F.2d 1208, 1218 (3rd Cir. 1978) quoting Lindy Brothers Builders of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3rd Cir. 1973); see Lindy Brothers Builders of Philadelphia v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 117 (3rd Cir. 1976) (Lindy II). Heigler continued,

"the contingency factor does not justify an increase for several reasons. This case was neither factually nor legally complex. *Lindy II supra*, at 117. This lack of complexity manifested itself in a risk of relatively small number of hours being expended without compensation. *Id.* Finally, where 'the lodestar as originally calculated by the district court [is] a significant amount in comparison to the amount awarded plaintiff in damages,' the court should be reluctant to increase the lodestar through the contingency factor. *Baughman, supra*, at 1218. In this case, the lodestar

constitutes a substantial percentage of the recovery received by plaintiff. Therefore, we conclude that no further adjustment to the lodestar is warranted." *Heigler, supra*, at 805

In another civil rights case, *McPherson v. School Dist. , No. 186, Springfield, Ill.*, 465 F.Supp. 749 (S.D. Ill. 1978), the court found that a multiplier of the hourly rate should not be used in that it was not permitted by the federal statute mandating an award to plaintiffs of attorneys fees and costs in civil rights litigation. See *McPherson, supra*, at 764.

Likewise, the court in *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714 (6th Cir. 1978), construed 42 U.S.C. §1988 in light of 20 U.S.C. §1617 to only provide for recovery of a "reasonable attorney fee". The court in *Oliver*

recognized that multipliers had been used in anti-trust cases, but found the use of such cases as analogous to civil rights cases with respect to the attorney's fee issue inapposite since there is usually a large monetary recovery in anti-trust cases. Oliver went on to say "attorneys fees awards should be high enough to attract competent counsel, yet not so high as to provide a windfall for them. Multiplying the number of hours properly spent times a reasonable hourly rate is sufficient to serve this goal." Oliver, *supra*, at 716.

The contingency nature of this action was not unusual enough to warrant an increase in lodestar. As stated in *Imprisoned Citizens Union v. Shapp*, 473 F.Supp. 1017, 1027 (E.D. Pa. 1979),

"Success here, albeit uncertain, was not so remote a likelihood

that counsel deserves to be compensated simply for taking the case. For over a decade, litigation of this sort has not been a stranger in the federal courts and the contingencies involved in bringing this suit are, to a great extent, foreseeable, and not extraordinary."

7.

CASES CITED BY FEE-PETITIONERS IN SUPPORT OF USE OF A MULTIPLIER ARE DISTINGUISHABLE.

Fee-petitioners, in their Memorandum of Points and Authorities in support of the instant motion, have contended that the use of a multiplier is appropriate in this case. To support their contention they have cited several cases which will be discussed individually at this point.

The first case presented by fee-petitioners is **Lindy Brothers Builders, Inc., of Phila. v. American Radiator & Standard Sanitary Corp.**, 487 F.2d 161

(3rd Cir. 1973). Lindy is the leading anti-trust attorneys fees case. Unlike the instant action, Lindy was a class-action. It was the court's task, upon the petitioners' request, to determine the proper award of attorneys fees to be paid from the settlement of the class action according to the equitable fund doctrine in an attempt to have the benefited parties pay the fees. It was as a result of a settlement agreement entered into therein that a single fund was created to satisfy the claims of all of the plaintiffs as well as those who had not filed suit. Attorneys fees were to be paid from this single fund, thus, in Lindy, the defendants were paying for plaintiffs attorneys fees only indirectly as part of the total settlement. Defendants were not required to pay

plaintiffs' attorneys fees in addition to the recovery by plaintiffs. The attorneys fees were merely a piece of the larger settlement pie. This is not at all like the case at hand where individual plaintiffs received individual specific awards by way of jury verdict, and now fee-petitioners request additional sums to be paid by Defendants as attorneys fees.

Similarly, in *In Re Gypsum Cases*, 386 F.Supp. 959 (N.D. Ca 1974), another anti-trust action, the court also applied the equitable fund doctrine: that is, it awarded attorneys fees out of a pre-determined settlement amount.

The third case raised by the fee-petitioners is *Philadelphia v. Charles Pfizer & Co. Inc.*, 345 F.Supp. 454 (S.D.

N.Y. 1972). This case is another example of an anti-trust class action creating a settlement fund from which attorneys fees were awarded, and is also one in which there was a prior agreement between counsel regarding the award of fees.

The next case cited by fee-petitioners is **Arenson v. Board of Trade of City of Chicago**, 373 F.Supp. 1349 (N.D. Ill. 1974) in which fee-petitioners claim a multiplier of four was awarded. Unfortunately, **Arenson** was miscited, and defense counsel have been unable to locate it at this point in time. Perhaps the fee-petitioners might supply defense counsel with a corrected citation or a copy of this case, so that they might be able to determine whether



**Arenson is another anti-trust class action equitable fund doctrine case.**

Finally, fee-petitioners refer to an unpublished opinion in Goldstein v. Alodex Corp., Civ. No. TI-1857 (E.D. Pa. December 7, 1973), in which they claim a multiplier of five was awarded. This case is likewise unavailable to defense counsel--as Plaintiffs attorneys must be well aware.

And, again, fee-petitioners refer us to **Keith v. Volpe**, 86 F.R.D. 565 (C.D. Ca. 1980), to support the use of a multiplier, albeit even this case has applied the common fund, common benefit doctrine and has instructed at 571:

"The Supreme Court limited this doctrine in **Alyeska Pipeline Service Co. v. Wilderness Society**, 421 U.S. 240 (1975), to those cases where the members of the benefited class are sufficiently identifiable and the tangible



benefits sufficiently ascertainable so that fee shifting would 'with some exactitude' shift the costs of litigation to those benefiting from the suit. Id. at 265 N.39. See also U.S. v. Imperial Irrigation District, 595 F.2d 525, 529 (9th Cir. 1979); Reiser v. Del Monte Properties Co., 605 F.2d 1135, 1139 (9th Cir. 1979)."

The common benefit doctrine requires that an action must confer substantial benefit on others (i.e. shareholders), persons benefited must comprise an ascertainable class, and the award of attorney fees must operate to shift the cost of litigation to such a group. Reiser v. Del Monte Properties Co., 605 F.2d 1135 (9th Cir. 1979). Here there has been no showing that an ascertainable class of persons benefited from the award of \$33,350.00 to the eight plaintiffs; nor has there been showing that all the citizen-taxpayers of the City of

Riverside gained from this suit. It is in reality those taxpayers who would be asked to pay the cost of this suit by increased insurance premiums on the municipal coverage.

**U.S. v. Imperial Irrigation Dist.**, 595 F.2d 525 (9th Cir. 1979), examined the "substantial benefits" doctrine and observed:

"justification for this exception [to the traditional rule disfavoring awards shifting legal fees] is that identifiable persons who benefit substantially from the action of the party seeking fees should share the costs. 'To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.' **Mills**, 396 U.S. at 392, 90 S.Ct. at 625. See also Hall v. Cole, 412 U.S. 1, 5-6, 93 S. Ct. 1943, 36 L.Ed.2d 702 (1973). However, because the beneficiaries frequently are not parties or members of a certified class before the court, this

exception is subject to an important limitation that bars an award in this case. The limitation is that there must be before the court a party against whom the court can assess fees who stands in such a relationship to the benefited class that the award will 'operate to spread the costs proportionately' and 'with some exactitude' among the identifiable beneficiaries of the fee-seeker's success. **Mills** 396 U.S. at 394, 90 S.Ct. at 626; **Alyeska**, 421 U.S. at 265 n.39, 95 S.Ct. 1612. Only when this is true will attorney's fees be effectively spread among those who stand to gain from the litigation without contributing to it, rather than simply being shifted to the loser. (As the **Mills** court put it: '[t]o award attorneys' fees in such a suit to a [successful] plaintiff . . . . is not to saddle the unsuccessful party with the expenses but to impose them on the class that would have had to pay them had it brought the suit.' **Mills v. Electric Auto-Lite Co.**, 396 U.S. 375, 396-97, 90 S.Ct. 616, 628, 24 L.Ed.2d 593 (1970). See also **Hall v. Cole**, 412 U.S. 1, 6, 93 S.Ct. 1943, 36 L.Ed.2d 102 (1973).)

The two leading Supreme Court cases are illustrative. In **Mills**, a shareholder prevailed in

an action to set aside the merger of his corporation into another because in recommending approval of the merger the directors of his corporation had failed to disclose that they were controlled by the acquiring company. The Court shifted the shareholder's attorney's fees to the corporation because the suit conferred a substantial benefit on all shareholders and the corporation itself, and because '[T]he court's jurisdiction over the corporation as the nominal defendant ma[kes] it possible to assess fees against all of the shareholders through an award against the corporation." 396 U.S. at 395, 90 S.Ct. at 627. All shareholders benefited from vindication of the securities fraud rules and, by requiring the payment of the counsel fees from the corporate treasury, all would be taxed their proportionate share of the costs through lowered dividends. The reasoning in **Hall v. Cole** is similar: the plaintiff-union member vindicated the rights of free speech in union affairs and thus 'rendered a substantial service to his union as an institution and to all of its members' (412 U.S. at 8, 93 S.Ct. at 1948); shifting plaintiff's counsel fees to the union would effectively charge all of the members with the cost of achieving the common benefit

by taking a share of each member's dues.

. . .

Ready identifiability is required to insure clear, concrete evidence that the fee-seeker's efforts produced actual benefits to others, and that fees are assessed only against beneficiaries--those who would be unjustly enriched by not sharing in the cost of producing the benefit--and not against persons whose positions are not substantially bettered because of the victorious lawsuit.

Thus it is apparent that the substantial benefits doctrine is inapplicable in this case because Plaintiffs have totally failed to show that anyone other than they themselves will benefit from this suit.

The Court's attention is directed to the fact that there simply was no common fund, equitable fund, or any other fund created in this case. The jury awarded

each individual Plaintiff funds in specified amounts for specified damages.

8.

DOWNWARD ADJUSTMENT OF THE OBJECTIVE VALUE OF COUNSEL'S SERVICES IS REQUIRED WHERE ONLY A FEW CITIZENS HAVE BENEFITED AND NO WIDESPREAD OR PERVASIVE VIOLATIONS OF CIVIL RIGHTS HAVE OCCURRED.

Once again, the Court's attention is directed to **Keown v. Storti**, 456 F.Supp. 232, 242 (E.D. Pa. 1978). The court in **Keown** on its own initiative, adjusted the objective value of counsel's services downward:

"This case vindicated the rights of only one person--Robert Keown. It was not a class action. It did not produce any new law that, through stare decisis, will greatly benefit others. The violation that was remedied was not widespread or pervasive; indeed, the jury found that Defendant Storti acted unlawfully only with respect to Robert Keown



and not as to his wife. Although redress of any civil rights violation advances the public interest, the advancement in this case was minimal. The \$2,500.00 damage award, which, in my view, was far in excess of proven compensatory damages, provided the Plaintiff more than full compensation for his injury." (emphasis added)

Thus, as in *Keown*, Plaintiffs in the instant action have been compensated for all injury. This is particularly so when, as here, Plaintiffs counsel offered at trial evidence of less than \$300.00 in damages.

9.

BONUSES ARE NOT AVAILABLE UNDER 42 U.S.C. §1988.

"Since the purpose of Title 42, U.S.C.A. §1988, is to assure private civil rights litigants of representation rather than to provide windfalls to attorneys, the Court is convinced that the request for bonuses is due to be

denied. **Preston v. Mandeville**,  
451 F.Supp. 617, 623, , (S.D.  
Ala. 1978)."

In **Preston**, the court not only addressed the issue of bonuses but also analyzed whether or not such a civil rights case was "undesirable" in relationship to counsel's request for a bonus:

"The **Johnson [Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)]** court was concerned about the economic impact that the acceptance of a civil rights suit might have on an attorney's law practice. Counsel for the plaintiffs assert that the 'undesirability' of this particular case and civil rights cases in general 'is evidenced by relatively few members of the Mobile Bar who have chosen to represent plaintiffs in cases of this nature.' This is not within the scope of 'undesirability' as envisioned by the **Johnson** opinion. The Court has already noted that **Hicks and Mandell [counsel in the **Preston** case]** do a great deal of civil rights work, and that **Brown's** law firm is similarly engaged. Under these circumstances the Court is convinced that no malevolent economic effect will be felt by these



attorneys; indeed the experience and reputation gained from such proceedings will no doubt aid each in their future practice." Preston, *supra*, at 622.

10.

THERE IS NO STATUTORY RIGHT TO PAYMENT OF OUT-OF-POCKET EXPENSES.

Overhead is not a compensable cost. Postage, clerical and typing services, reproduction, mailing, long-distance telephone calls, secretarial overtime and transcript have all been considered by the courts to be regular office overhead and not a compensable cost. *Keith v. Volpe*, 86 F.R.D. 565 (C.D. Ca. 1980); *Cole v. Tuttle*, 462 F.Supp. 1016 (N.D. Miss. 1978).

Similarly, travel expenses and long-distance phone call expenses incurred by Mr. Cazares in this case should be

reduced as it was done in **McPherson v. School Dist. No. 186. Springfield, Illinois, supra**, at 763, with regard to the selection and use of out-of-town counsel. Courts have been mixed in their determination of whether law clerks and paralegals should be included in an award of attorneys fees. Both **Oliver v. Kalamazoo Board of Education**, 576 F.2d 714 (6th Cir. 1978) and **Scheriff v. Beck**, 452 F.Supp. 1254 (D. Colo. 1978) have held that paralegal and law clerk services are merely part of attorney's overhead and should not be considered in an award of attorneys fees.

11.

**FEE-PETITIONERS ARE NOT ENTITLED  
TO AN INERIM AWARD OF FEES**

Fee-petitioners in their memo of points and authorities attached to the instant motion have contended that they are entitled to an interim award of fees. Defense counsel herein have difficulty comprehending the nature of fee-petitioners request, as well as the applicability of cases cited by fee-petitioners to support their contention. **Schaeffer v. San Diego Yellow Cabs, Inc.**, 462 F.2d 1002 (9th Cir. 1972) totally fails to address the issue of interim fees. Likewise, **Davis v. County of Los Angeles**, 8 E.P.D. §9444 (C.D. Ca. 1974), also totally fails to address the issue of an interim award of fees. In **Malone v. North American Rockwell Corp.**,

457 F.2d. 779 (9th Cir. 1972), the court awarded \$2,500.00 in attorneys fees for services on the appeal "that amount having been stipulated to as reasonable by North American's counsel." **Malone, supra**, at 781. This, too was not an "interim" award.

We agree with fee-petitioners that an award of attorneys fees can be an integral part of the relief sought in a civil rights action and therefore the judgment is not final and appealable until they have been set by the Court, after proper request for same.

However, are Plaintiffs' counsel implying by the request for an award of attorneys fees in the instant case, that they should be paid whatever sum they have request at this point, regardless of whether the Defendants should choose

to appeal such an award? Where is the statutory or case law authority for such a request? It is not reasonable to conclude that such an award of interim fees is implanted in the Civil Rights Act.

12.

THE ECONOMIC IMPACT OF FEE AWARDS  
MUST BE EXAMINED BY THE COURT.

Recent cases have suggested that the Court must be cognizant of the economic impact of monetary awards where the financial risk, or burden, is shifted from one party to another. Such a shift must result in the greater good, i.e. lower cost, redressed wrong, to benefit the larger group of persons. Here, as in *Oliver v. Kalamazoo*, *supra*, at 718, there is being created a tax-payers'

burden, for it is the Riverside taxpayer who is being asked to pay Mr. Cazares and Mr. Lopez. This is because, although the City is covered by insurance, the insurance premiums are paid by tax dollars. Just as automobile insurance rates increase with sizeable claims and recoveries, so do insurance rates for municipalities. The cost to the tax-payers who have been requested by fee-petitioners to pay their fees must be weighed as compared to the benefit to the eight individual Plaintiffs in the instant action and, of course, their two attorneys.

As in *Keyes v. School Dist. No. 1, Denver, Colo, supra*, at 415, it must be remembered that the public must bear the financial burden and that "attorney fee

entitlement cannot jeopardize the financial realities of the agency paying the fee;" in this case, the City of Riverside. It was found in *McPherson v. School Dist. No. 186, Springfield, Ill., supra*, at 757, that "Defendant is a public body and a fee award is essentially reallocating a portion of the property tax area residents pay [from one civic benefit to another]. . . . It is incumbent [on the court] to scrutinize Plaintiffs' fee request to assure the public is not overcharged."

DATED: December 31, 1980.

Respectfully submitted,  
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Patti Ann Kotler  
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LOS ANGELES TIMES  
METRO

Sunday, November 16, 1980

Local News  
CC Part II

Latinos, Police Both Claim  
Lawmen Hope Barrio Controversy Ends

By LORRAINE BENNETT, Times Riverside-San Bernardino Bureau

On the night of Aug. 1, 1975, as Riverside sweltered in sticky summer heat, Jennie and Santos Rivera prepared a bachelor party for their nephew.

Guests began to arrive and gathered in the Riveras' open garage, where they sat drinking and talking.

From time to time, a black and white unit from the Riverside Police Department cruised by, patrolling the loose confines of Casa Blanca, Riverside's explosive Latino barrio, where the password is violence.



Accounts vary now, five years later, about who started what. But the clash between the Riveras' guests and Riverside police that August night resulted in 51 arrests - the largest number ever jailed from a single incident in Riverside history.

At least two Latinos suffered injuries, and one police officer was hurt so seriously he was forced to retire from the force.

In the wake of the arrests came two trials. The first was a criminal case in which three of the party guests were convicted and received sentences ranging from probation to fines and 30 days in jail.

The second trial, stemming from a lawsuit filed against the City of Riverside and its police department, ended

Oct. 7 when a federal jury in Los Angeles awarded a total of \$33,850, plus lawyers' fees, to eight Latinos and found the police guilty of violating their civil rights.

Attorneys for the Latinos plan to seek an increase in the amount of damages when they return to court Dec. 15.

In spite of what they consider to be small awards, they view the decision as a significant civil-rights victory because it marks the first time such convictions have been returned against Riverside police.

To police, however, the amount of damages is a message from the jury that the officers acted with some justification. They hope the jury's decision will bring an end to five years of

controversy between authorities and residents of the barrio.

### **Unlikely That Hard Feelings Will End**

It appears unlikely, however, that hard feelings among the Casa Blanca Latinos will end now. This is a small ethnic pocket originally carved from citrus groves by Mexican farm workers. It lies south of Interstate 91, a square-mile community far removed in concept from the rest of Riverside.

With its ethnic graffiti and spectacular sidewalk murals, Casa Blanca carefully guards its identity against encroaching industrial development and tract housing.

The barrio has gained national notoriety as an infamous battleground where two warring Latino families have engaged

in a blood feud that began 16 years ago between drinking partners in a local bar.

The feud has escalated since the mid-1970s. Eight members of the two feuding families, the Ahumadas and Lozanos, have been gunned down during such simple activities as sitting on a front porch or strolling down the street.

Tension already was thick in Casa Blanca on Aug. 1, 1975, when Jennie Rivera and her husband Santos prepared to open their comfortable, well-groomed home for an evening in honor of nephew Lee Roy Rivera's upcoming wedding.

Mrs. Rivera does not, to this day, consider her home a part of Casa Blanca. But boundaries blur in neighborhood communities. Although the barrio proper lies half a mile away in Jennie Rivera's

mind, to Riverside police, her house is still within Casa Blanca's "sphere of influence," and when any crowd gathers there, police take notice.

As a matter of course, officers already were patrolling the Riveras' neighborhood in strengthened numbers that night. An Anglo family had argued with a Latino family. In the exchange of insults, the two groups had been seen sitting in their front yards with rifles across their laps. Police patrols had increased.

So as the Friday night party crowd gathered at the Rivera house, police patrols were already cruising the neighborhood and the crowd took notice.

Time and emotion have distorted the sequence of events of that evening. Police claim the first incident involved

a minor carrying a cup of beer. They say he came from the Rivera house.

Police say they did not pursue that violation, but when they received a prowler report and saw two other youths scurry away, and when a pickup truck rolled down the street with its lights blinking and the driver displaying open containers of alcoholic beverages, the police decided to investigate.

During the interrogation, police say, a group of Latinos from the Rivera party interfered, a scuffle broke out and the group began throwing dirt clods, rocks and bottles at officers.

Police called for reinforcements. Additional units and a police helicopter arrived, and the party goers retreated into the Rivera house.

An order to disperse, given over the helicopter loudspeaker was ignored, police say, and they were forced to use tear gas to flush the crowd from the house.

The Latinos claim they never heard such an order, that police first told them to go inside, then tear gassed them out.

Jennie Rivera has a vivid recollection of stumbling, blinded by tear gas, through her front door and coming face to face with lines of uniformed officers, one line kneeling in front of the other.

They were pointing rifles at the house, she says. Police, however, say no rifles were in use that night, and that regulation shotguns remained in police vehicles. What Mrs. Rivera saw

may have been batons in the hands of officers, police say.

One of the Latinos, Jerome Rivera, a brother of the guest of honor, was hit over the head in a scuffle with police. Witnesses say another party goer, Manuel Flores, Jr., was struck so hard an officer felt for his pulse.

Police contend Jerome Rivera assaulted an officer with a belt he had wrapped around his hand. They say Flores threw a large dirt clod at officers.

Mrs. Rivera is certain that what she saw was rifles. She contends the people attending her party were herded together like cattle, handcuffed and carted off to the police station although, she says, they had done nothing wrong.

Charges against most of those arrested were dropped shortly afterward. In



early 1976, a Riverside jury convicted two men and a women on charges that included battery against a police officer and resisting arrest. Their sentences ranged from probation to fines of \$190 and 30 days in jail.

The jury failed to return a verdict on three more Latinos accused by police. The district attorney's office requested dismissal of charges against two others.

In June, 1976, eight Latinos filed suit against the City of Riverside, the police chief and 31 officers for violating their civil rights, false arrest and imprisonment, malicious prosecution and negligence. They sued for \$9.75 million and requested a jury trial.

## **Eight Settled for \$16,000**

The civil suit also accused the police of conspiring to cover up the events of Aug. 1 by filing false reports.

Other issues in the case included whether the Latinos had heard and understood the order to disperse, whether police actually witnessed persons committing arrestable offenses and whether officers used undue force in making the arrests.

When the federal jury in Los Angeles finally handed down its decision, it found the police department and four officers guilty of violating the civil rights of eight Latinos during the disturbance.

It found no evidence that police conspired to cover up what had actually occurred by filing inaccurate reports.

"We're just glad it's over," said Deputy Police Chief L. L. (Sonny) Richardson, a sargeant on the police force in 1975 and one of the defendants in the case.

"As long as that lawsuit was hanging, it had a chilling effect on (police) relations with the Casa Blanca community."

Richardson feels what happened five years ago was "another time and place." Changes have been made, including the installation of a new police chief and better training for officers in dealing with barrio disturbances, he said.

Richardson is one of those who believe the jury sent the police department a message by awarding what has been considered a low sum to the Latinos.

### **'Compassion For The Plaintiffs'**

"I think they felt the police acted with cause," Richardson said. "I don't think the jury set out to punish the police department, but I think they felt some compassion for the plaintiffs, too, that they were deserving of some award."

Although Jennie Rivera sees the award as "a big step for us and for the Mexican community" and a vindication of "standing up for our rights," Jerome Rivera, who received more than \$6,000 for civil rights abuses, false arrest and negligence, was not satisfied.

Now when a problem develops in his neighborhood, Rivera says, he will not bother to call the Riverside police for help.

"Whoever they send might be one of them (the convicted officers). By fighting for my rights I'm going to have to give up a few."

And so the hard feelings continue to smolder. U.S. District Court Judge Mariana Pfaelzer said the jurors made no comment on the low monetary award when they returned 37 verdicts against Riverside police.

The judge did say, however, that if Riverside police are construing the sum to mean they had done nothing wrong, they are in error.

"If the jury found for the plaintiffs, they (Riverside police) certainly

did something wrong," the judge said. "But actually, it is improper for me to answer that kind of question."

Renee Wong of Los Angeles, who served as jury formen, said the jury had no idea the Latinos had sued for such a large sum in damages.

Roy Cazares, attorney for the plaintiffs, said he elected not to raise the issue of \$9.75 million in damages during the actual testimony because "I didn't think we had proved that amount in damages."

"We wanted the Riveras to get something for putting up with the case for five years. But we didn't see any strong evidence to tell us to give them a whole lot of money, either," Wong said.

### **'We Thought They Were Wrong'**

At the same time, the jury wanted the Riverside police to know "we thought they were wrong, to slap their wrists, so to speak," she said.

The jury reached the point where members asked the judge for guidelines in awarding damages in the civil liberties suit, "but she sent back word to use our own good judgment," Wong said.

Deloris Lukens of Hemet, a member of the jury, said jurors did not have enough proof for an airtight case against police.

Juries traditionally make low awards in civil rights cases because they see the money as coming directly from taxpayers' pockets, Cazares said.

"Riverside police have a siege mentality when it comes to Casa Blanca,"

Cazares commented. "When you have that kind of fear, you will react to reinforce your stereotypes.

"That kind of thought process by rank-and-file police officers proceeds from the top down."

But no one will ever convince Deputy Chief Richardson that he or his officers overreacted in Casa Blanca that night.

Just two weeks after the events of Aug. 1, three officers and four civilians were injured in a violent outburst in the barrio. One officer's eye was shot out and he was permanently retired from the force, Richardson said.

Of the Aug. 1 clash, Richardson concluded, "I felt we used the amount of force appropriate for the offenses under which the arrests were taking place.



~~~~~

"In this case, I believe everybody thinks they are telling the truth. I think the Riveras are honest in how they saw the events of Aug. 1. I also feel the police department is as honest.

"What we are talking about here are perceptual differences. They saw us as an undisciplined, unruly mob. We saw them the same way."

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
HONORABLE MARIANA R. PFAELZER,  
JUDGE PRESIDING

SANTOS RIVERA, et al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
CITY OF RIVERSIDE, )  
 )  
Defendants. )  
\_\_\_\_\_ )

No. CV 76-1803 MRP

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
(Partial)

PLACE: Los Angeles, California  
DATE: Tuesday, October 7, 1980

REBECCA RIMSON  
Official Reporter  
325 U.S. Court House  
312 North Spring Street  
Los Angeles,  
California 90012  
(213) 680-1297

APPEARANCES:

For the Plaintiffs:  
CAZARES & TOSDAL; By  
ROY B. CAZARES  
225 Broadway  
Suite 1352  
San Diego, California 92101

For the Defendants:  
KOTLER & KOTLER; By  
JONATHAN KOTLER  
PATTI ANN KOTLER  
8500 Wilshire Boulevard  
Suite 903  
Beverly Hills, California 90211

LOS ANGELES, CALIFORNIA, TUESDAY, OCTOBER 7, 1980; 2:30 P.M.

---oOo---

\* \* \* \* \*

THE COURT: All right. Mr. Flores is going to make a copy of the verdicts for you, both of you, and I will hear anything that you have to say and I will listen to anything you want to say about any further application for relief that you want to make to the Court or any

motions that you want to make of any kind.

MR. CAZARES: At this time, your Honor? Well --

THE COURT: You don't have to make the motion now. I am asking you is there anything further that either of you want the Court to do?

MR. CAZARES: Yes, your Honor.

THE COURT: Or any motion you want to make?

MR. CAZARES: On behalf of the plaintiffs and their counsel, we will be making a motion for attorney fees and perhaps a motion for additur.

MR. KOTLER: Your Honor, the only thing I'd like to request to the Court at this time is that if the Court is aware of our scheduling difficulties, to the extent that we have motions, and

they are set far enough into November that we could prepare an adequate response to.

THE COURT: Well, you can agree with Mr. Cazares about how we are going to deal with the attorney's fees issue. The only thing I tell you is I'm not going to set it in November. It has to be set in October.

MR. KOTLER: We're not going to be in the country.

THE COURT: You're about to leave, aren't you?

MR. KOTLER: Yes, your Honor.

THE COURT: Then we can set it as soon as -- when are you coming back?

MR. KOTLER: We'll be back around the 1st of November.

THE COURT: Then we can set it a week after you get back.

MR. KOTLER: I had in mind -- it would be on a Monday, would it?

THE COURT: No, it doesn't have to be. It can be any day you wish.

MR. KOTLER: I was going to suggest November 10, which is the first Monday.

THE COURT: Is that all right with you?

MR. CAZARES: Yes.

THE COURT: Now, the burden is on you, as you know. All you have to do is to submit to the Court what your hours are.

MR. CAZARES: Yes.

THE COURT: And what you did.

MR. CAZARES: Yes.

THE COURT: The only thing I advise you is that you know, as well as I do, in the Ninth Circuit you have to give me

the hours, the day you worked, and what you did.

MR. CAZARES: Yes, ma'am.

THE COURT: And if there are other people who worked -- for example, Mr. Lopez, Professor Lopez, or any other people who have worked on the case. But you've got to tell them that I cannot grant attorney's fees of any kind or costs unless I have somebody give me a detailed account of what was done.

MR. CAZARES: Yes.

THE COURT: Now, it's obvious that I do not have to have a very detailed account of the days you were in trial, because you were in trial all that length of time, and I can take notice of that. But the preparation for the trial and all the time that you spent in

coming here with the Riveras, and so forth, I have to have dates and hours.

MR. CAZARES: We'll prepare a proper motion, you Honor.

THE COURT: Did you come to -- and you also have to be aware of another thing, and that is, since I wasn't the judge on the case originally, you will have to reach back to the period of time when it was in the hands of another judge.

MR. CAZARES: Yes.

THE COURT: Now, the only thing I tell you, Mr. Kotler, is that he is going to get substantial attorney's fees, because this is a lot of time we're talking about.

MR. KOTLER: Yes, your Honor.

THE COURT: My disposition now, so that you would be aware of it, is that I



would give Mr. Cazares the attorney's fees that cover everything that he did that's legitimate so that the burden of the attorney's fees does not fall on the parties.

MR. KOTLER: Is your Honor aware that there are other judgments that were issued summarily by Judge Ferguson and still not final as of this time?

THE COURT: I understand that, but I will have to reach back in those files. You will have to give me a legal ground to do it, and then you'll have to give me the time, but if you give me the basis for the time -- I'm doing this more for your benefit, Mr. Kotler, than I am anybody else's, because I want to let you know now how I feel about attorney's fees. It is wrong to ask counsel who worked that hard and then not

compensate him if there's a legal ground to do it and he can show me. That's all.

MR. KOTLER: I'm not disagreeing.

THE COURT: And the final thing I say is that I have no quarrel with the quality of what he did. So if I have no quarrel with the quality and he gives me the hours, I will compensate him. And you'll have to tell me the rate.

MR. CAZARES: Yes, your Honor.

THE COURT: All right.

MR. CAZARES: Thank you.

THE COURT: Now, is there anything else?

MR. KOTLER: Have we agreed on the 10th of November?

MR. CAZARES: Yes. That's fine.

THE CLERK: 9:30.

THE COURT: All right. Now, when will you put the papers in and when will you answer? That you will have to agree to.

MR. KOTLER: I can have them served by messenger on Mr. Cazares.

THE COURT: It's up to you.

MR. KOTLER: I would think by the 5th.

THE COURT: Is that all right with you?

MR. CAZARES: That's fine, your Honor.

THE COURT: All right. That's fine.

MR. CAZARES: I don't ask that he serve both counsel.

THE COURT: That's fine.

MR. CAZARES: Thank you very much, your Honor.

THE COURT: All right. Thank you, Mr. Kotler. Thank you, Mr. Cazares.

MR. CAZARES: Thank you, your Honor.

THE COURT: Here are the verdicts. You can take them if you want to and discuss them with your clients if you'd like. Mr. Kotler's clients are not here. And then we'll both make a copy for you.

MR. CAZARES: I'll make sure the copies are made.

MR. KOTLER: Is that going to be done now?

THE COURT: It will be done now.

(Proceedings were concluded.)

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
HONORABLE MARIANA R. PFAELZER,  
JUDGE PRESIDING

SANTOS RIVERA, et al.,        )  
                                  )  
Plaintiffs,                    )  
                                  )  
vs.                               )  
                                  )  
CITY OF RIVERSIDE, et al.,    )  
                                  )  
Defendants.                      )  
\_\_\_\_\_

No. CV 76-1803-MRP

C E R T I F I C A T E

I, REBECCA RIMSON, hereby certify  
that I am a duly appointed, qualified  
and acting official court reporter for  
the United States District Court, Cen-  
tral District of California.

I further certify that the foregoing  
8 pages comprise a true and correct

transcript of the proceedings had in the above-entitled cause on October 7, 1980, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this \_\_\_\_ day of December, 1980.

---

Official Reporter

**UCLA LAW**  
**THE MAGAZINE OF THE UCLA SCHOOL OF LAW**  
Vol. \_\_\_\_ No. 3 SPRING 1980

Washington Lawyering: UCLA Alumni  
in the Nation's Capitol

**The Faculty**

Benjamin Aaron has completed a chapter for the labor law volume of the International Encyclopedia of Comparative Law on settlement of labor disputes over rights. He also addressed the Administrative Law Judges Conference on "The Union's Duty of Fair Representation" in February. Professor Aaron is vice chairman and chairman-elect of the statewide Academic Senate and is editor-in-chief of the quarterly journal, Comparative Labor Law.

**Norman Abrams** authored a study, "Administrative Process Alternatives to the Criminal Process," which was published by the National Center for Administrative Justice. His brief paper, "Some Observations on Basic Research on Administrative Procedure and the Idea of a Procedural Continuum" was published in an **Administrative Law Review** symposium.

At a conference on white collar crime at Temple University, he gave a paper on "White Collar Crime and the Federal Role in Law Enforcement," which will be published in the **Temple Law Review**. He also presented a paper on "The Liability of Corporate Officers for the Strict Liability Offenses of their Corporation--A Comment on Dotterweich and



Park" at the Corporate Law Institute in New York.

Professor Abrams, who is teaching a new course on "Federal Criminal Law Enforcement" in which he is using his own casebook materials, is on the steering committee of UCLA's Center for International and Strategic Affairs. This spring he is the center's acting co-director.

Reginald Alleyne recently published an article in *Hastings Law Journal* on the new collective bargaining law for California universities and colleges. Along with Joseph Grodin and Donald Wollett, Professor Alleyne edited a casebook on public sector collective bargaining published by the Bureau of National Affairs.

He addressed a conference of California Administrative Law Judges on arbitration and unfair labor practice remedies and was a seminar leader at a California School Employees Association conference on administrative practices before the California Public Employment Relations Board.

**Michael R. Asimow** has completed a study for the Administrative Conference of the United States on the separation of functions in federal administrative agencies.

He plans to study the functioning of English administrative agencies during his spring semester sabbatical.

John A. Bauman has been appointed executive director of American Law Schools, and will be on a two-year leave from the University to take up his duties in Washington, D.C.

Helen Bendix has completed work on Supreme Court Practice and Jurisdiction (with Moore and Ringle) to be published by Matthew Bender Company.

Paul Bergman is a faculty member for the 1980 AALS Clinical Teachers Conference to be held in Montana this June. He has supervised the drafting of new problems for the 1980 experimental portion of the California bar exam to test the practical skills of the examinees. Bergman is also writing an article with the relationship between class action

class representatives and attorneys for the class.

**David Binder** has developed an estate planning curriculum for the American Bar Association's pilot program on law office skills. He was an instructor on that subject for ABA pilot projects in Berkeley and Chicago.

Professor Binder also has published an **Instructor's Manual on Legal Interviewing and Counseling**.

**Grace Blumberg** has completed an article, "Adult Derivative Benefits in Social Security," to be published by the **Stanford Law Review**. She is currently writing on several aspects of unmarried cohabitation.

Professor Blumberg is serving on the advisory board and litigation subcommittee of the "ERA Impact Project" undertaken by the NOW Legal Defense and Education Fund and the Women's Law Project.

Richard Delgado delivered papers at New York University Law School and the New School for Social Research, and testified before two legislative committees on issues relating to religious movements and the law. His article, "Active Rationality in Judicial Review" appears as the lead article in the *Minnesota Law Review*.

The *New York Review of Law & Social Action* will publish a second article, "Religious Totalism as Slavery" and he has co-authored an article on medical malpractice with

second-year law student Joan Vogel. Professor Delgado is now working on an article, "The Moralist As Expert Witness."

George P. Fletcher prepared a 500-page volume of case histories and legal analysis for the UCLA-hosted conference on "Soviet Jews Under Soviet Law," which is now available in law libraries around the country. He spent two weeks in the Soviet Union working on the Shcharansky case and later returned to Moscow on an academic exchange to present a paper on the "Presumption of Innocence in Soviet and America Law" at the Soviet Institute of State and Law. The institute's journal will publish a Russian translation of the paper.

Professor Fletcher also presented a paper on German approaches to the "taking" problem at the USC Conference on Comparative Constitutional Law. He will teach courses on criminal law and legal philosophy as a visiting professor at the University of Frankfurt this spring.

Carole Goldberg-Ambrose is serving as principal investigator of a University grant to produce a series of films on Indian Law.

She recently delivered a report on "Energy Mobilization and the Balance of Federal, State and Tribal Power," and plans to turn that research into several articles.

Donald G. Hagman will teach "Public Control of Land" at the University

of Michigan this summer, hoping to use the recently completed second edition of his casebook on that subject.

The southern section of the American Planning Association recently honored Professor Hagman for his outstanding contributions to planning in this area.

**William A. Klein** has published **Business Organization and Finance: Legal and Economic Principles** with Foundation Press this year.

He is also participating in a new course called "Motion Picture Business Transactions," along with instructors Gary O. Concoff and David R. Ginsburg, both of Kaplan, Livingston, Goodwin, Berkowitz & Selvin.



Wesley J. Liebeler recently published a review of Bork's **The Antitrust Paradox** and has completed a manuscript the antitrust activities of the FTC to published by Oxford University Press. He gave papers at the Western Economic Association, the American Economic Association, the Southwestern University Antitrust Symposium, and an antitrust symposium sponsored by the Law and Economics Center.

Professor Liebeler is working on a paper on the implications of the GTE Sylvania case and a review of current antitrust problems for the Hoover Institute. He is also preparing an article on Friedman vs. Rogers (Texas) for the Law and Economics Center as well as a paper on

the 1901 U.S. Steel merger for the Law and Economics Program at the University of Chicago.

**Gerald Lopez** is nearing completion of his article, "Undocumented Mexican Migration: In Search of a Just Immigration Law," and is researching the development of law surrounding Section 1983.

Professor Lopez was invited to deliver a lecture on "Civil Rights Litigation" at California's first Minority State Bar Convention. He has also been invited to testify before President Carter's Select Commission on Immigration and Refugee Policy.

**Daniel Lowenstein** is a member of the national governing board of Common

Cause, and an active member of the campaign advisory committee of Californians for Smoking and No-Smoking Sections.

Michael D. Rappaport delivered a paper comparing minority and white placement patterns in the legal profession before the National Conference of . . .

**AFFIDAVIT OF JONATHAN KOTLER**

STATE OF CALIFORNIA    )  
                                  ) ss.  
COUNTY OF LOS ANGELES)

I, JONATHAN KOTLER, being first duly sworn, depose and say:

1.     I am an attorney at law in good standing with the State Bar of California duly licensed to practice in all of the courts of the State of California, and am attorney for the Defendants herein and by virtue of the foregoing, I have personal knowledge of and am competent to testify to and if called to testify would so testify to the following:

2.     I have read both the Affidavit of Gerald P. Lopez and that of Roy B. Cazares re: request for attorneys fees, and since the legal arguments in opposition to their motion are contained in

the Memorandum of Points and Authorities filed concurrently herewith, I will confine this affidavit to the subject matter of their affidavits.

3. Directing this Honorable Court's attention to paragraph 7 at page 4 of Mr. Lopez' affidavit, wherein Mr. Lopez refers in two separate places to the "litigious nature of defendants", your Affiant finds it hard to understand how defendants can ever be litigious. If, as Mr. Lopez seems to indicate, he is referring to objections to discovery and witnesses, then your Affiant is content to rest on the record of this case wherein Mr. Lopez and his clients were precluded by court order from discovery which your Affiant, as attorney for Defendants herein objected to, and they eventually withdrew a myriad of

exhibits and witnesses to which, likewise, your Affiant objected. Apparently, Mr. Lopez is taking the position that your Affiant has been litigious for doing those very things, which, if your Affiant hadn't done, your Affiant could be sued for malpractice by his very own clients.

4. In the same paragraph, Mr. Lopez states:

"Finally, and perhaps the best evidence of the litigious nature of defendants, the number of hours expended is great because defendants never once made a reasonable settlement offer."

5. To that dubious charge, your Affiant states that he is unaware of rule of law which would require him to respond to unreasonable settlement offers, the last one of which was for an

amount nearly ten time the award eventually made by the jury herein. Further, what Mr. Lopez does not state (and perhaps, because he has not checked with Mr. Cazares) is that the last settlement offer made by your Affiant to the Plaintiffs herein, through Mr. Cazares, was for the sum of \$25,000.00. This amount was only eight thousand dollars away from the amount the jury eventually awarded, but it was rejected by Mr. Cazares who, apparently, anticipating a very large jury award herein, told your Affiant that he would be seeking attorneys fees in the sum of \$70,000.00 for Mr. Lopez and himself.

6. The aforesaid offer of \$25,000.00 was made prior to the jury coming back with its award herein, and

while they were deliberating. Subsequent to the jury's findings herein, the attorneys for the Plaintiffs herein immediately forgot not only that the settlement offer was made, but have increased their demand for attorneys fees more than six-fold, although no other services were rendered by them (according to their own affidavits) between the time this offer was made and their demand for attorneys fees herein was filed, other than asking for fees for themselves.

7. As to the affidavit of Mr. Roy B. Cazares filed in an effort to get from this Honorable Court what the jury refused to give his clients, attention is drawn to paragraph 2 of said affidavit wherein Mr. Cazares apparently is under the belief that "counsel for



defendants knew or should have known that expenses alone totaled nearly \$7,000.00" and on that basis should have increased the settlement offer made by your Affiant's clients.

8. What your Affiant cannot understand and cannot reconcile, is how your Affiant should have known that Mr. Cazres' expenses "alone totaled nearly \$7,000.00" when his very own affidavit filed in conjunction with his request for attorneys fees (Exhibit "C" to the Motion) shows expenses of \$4,038.51. Is this three thousand dollar difference merely an oversight on Mr. Cazares' part? Put another way, how can Mr. Cazares really expect that our Affiant "knew or should have known that expenses alone totaled nearly \$7,000.00" when his

own belief and evidence is to the contrary?

9. And finally, as stated in your Affiant's own Motion for Attorneys Fees filed previously in this matter, and to also be heard on January 19, 1981, your Affiant, who has a great deal more litigation experience than either of the opposing counsel in this matter, having been a trial lawyer, and having been involved in federal court litigation since 1971 (or nearly twice as long as either Mr. Lopez or Mr. Cazares) has throughout this entire action charged his clients the sum of \$50.00 per hour. The results herein show that at the sum of \$50.00 per hour your Affiant obtained approximately 10 times as many judgments for his clients as counsel for the Plaintiffs herein did for theirs, and

yet they are seeking attorneys fees based on an hourly rate of up to \$300.00 per hour.

10. Executed at Beverly Hills, California, this 5th day of January, 1981.

/ss/Jonathan Kotler  
JONATHAN KOTLER

Subscribed and sworn  
to before me, this  
5th day of January,  
1981.

/ss/Roger Franklin  
NOTARY PUBLIC IN AND FOR  
SAID COUNTY AND STATE  
My Commission Exp. Apr. 27, 1983

**PROOF OF SERVICE BY MAIL**

**STATE OF CALIFORNIA,  
COUNTY OF LOS ANGELES**

I, the undersigned, say: I am and was at all times herein mentioned a citizen of the United States, over the age of 18, herein employed in the County of Los Angeles and not a party to the above entitled action; that my business adress is 8500 Wilshire Blvd. Suite 903, Beverly Hills, California 90211.

That on January 5, 1981, at the direction of Jonathan Kotler, a member of the Bar of the State and Federal Courts of the within district, I served the within DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF JONATHAN KOTLER IN SUPPORT THEREOF on the Attorneys for Plaintiffs in said action or proceedings by depositing a

698  
true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Beverly Hills, California, addressed to Attorneys of Record for said Plaintiffs as follows:

Roy B. Cazares  
Cazares & Tosdal  
225 Broadway, Suite 1352  
San Diego, CA 92101

Jerry Lopez  
c/o UCLA School of Law  
405 Hilgard Ave.  
Los Angeles, CA 90024

Executed on January 5, 1981, at  
Beverly Hills, California.

I declare under penalty of perjury  
that the foregoing is true and correct.

/ss/Maggie Miller  
Maggie Miller

## APPENDIX 11

CAZARES & TOSDAL  
Attorneys at Law  
225 Broadway, Suite 1352  
San Diego, Ca 92101  
Telephone: (714) 233-6581  
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,        )  
                                  )  
          Plaintiffs,        )  
                                  )  
      vs.                        )  
                                  )  
CITY OF RIVERSIDE, et al.,    )  
                                  )  
          Defendant.         )  
\_\_\_\_\_                          )

NO. CV 76-1803-MRP

**AFFIDAVIT OF ROBERT L. WINSLOW IN  
SUPPORT OF PLAINTIFFS' MOTION FOR  
REASONABLE ATTORNEYS FEES AND COSTS**

ROBERT L. WINSLOW, first being duly  
sworn, deposes and says:

1. I am a partner and the co-chair-  
man of the litigation department in the

law firm of Irell & Manella. I am a 1949 graduate of Stanford Law School where I served on the Board of Editors of the Stanford Law Review. I was admitted to the California Bar in June 1949 and immediately began practice as a Deputy District Attorney in Mendocino County, California. In March of 1950, I left the District Attorney's office to become an individual and sole practitioner in Mendocino County. I operated my own law office until April 1961 when I was appointed to the Superior Court in Mendocino County. I served as a Superior Court Judge until January of 1969 when I joined the firm of Mitchell, Silberberg & Knupp in Los Angeles. I remained with that firm until September of 1972 when I joined the firm of Irell & Manella.



2. During the first ten years of my practice, I was a general practitioner operating a typical small office general practice, including of course a wide range of litigation. During the next eight years of my professional life, I had the enriching experience of serving as a Superior Court Judge where, as a trial judge, I presided over a wide variety of trials, including commercial, domestic, criminal, personal injury and eminent domain trials. I tried several homicide cases as well as cases of minor significance. I also served on the faculty of a number of Judicial Council sponsored institutes and the faculty of the California College of Trial Judges. While at Mitchell, Silberberg & Knupp and in my current position at Irell &

Manella I have been involved primarily in complex commercial litigation.

3. Recently, in a major consumer class action where I was chief counsel representing the plaintiff class, **Garrett v. Coast Federal Savings and Loan Association**, Los Angeles Superior Court No. C995634, I was involved in preparing and presenting to the Court an application for attorneys' fees in that action for the successful plaintiffs' counsel. In connection with that action, and generally as a partner in a large commercial law firm, I have become familiar with the general criteria for fixing attorneys' fees and with the range of attorneys' billing rates charged by attorneys in Los Angeles County. Those billing rates range from \$50 an hour to

\$250, depending upon the age, skill and experience of the particular attorney.

4. I have been informed that Gerald P. Lopez was graduated from Harvard Law School approximately seven years ago, that for over five years he has specialized in civil rights litigation, that he teaches a course on civil rights legislation (focusing on §1983) at the School of Law at the University of California at Los Angeles, and that he researches and writes in the field of civil rights. It is my opinion that \$125 per hour is a reasonable hourly billing rate for a person of Mr. Lopez' background and experience.

5. I have been informed that Roy B. Cazares was graduated from Harvard Law School over seven years ago, that for

seven years he has specialized in litigation, with the last five years devoted primarily to civil rights litigation, and that he has lectured on civil rights, constitutional law and police-community relations. It is my opinion that \$125 per hour is a reasonable hourly billing rate for a person of Mr. Cazares' background and experience.

6. By hourly billing rate I have been referring to the billing rates at which time is recorded by a law firm as work is being performed on a matter. This hourly billing rate only provides a guideline for a determination of a reasonable and proper fee in a given matter. The reasonableness of a fee also depends upon the complexity of the issues involved in the matter, the experience in the particular field of

the attorneys involved, the result achieved, the risk of an unfavorable result, whether the case was taken on a contingency basis and the vigor with which the case was litigated by both sides. These factors, in an appropriate case, might support a reasonable attorney's fee significantly in excess of the reasonable hourly billing rate multiplied by the number of hours worked on a case.

7. The information contained herein is of my own personal knowledge, except as otherwise specified herein, and if called as a witness in this matter I would be competent to testify to all of the above.

Dated: December 18, 1980

/ss/ Robert W. Winslow  
ROBERT W. WINSLOW

STATE OF CALIFORNIA     )  
                                  )   ss  
COUNTY OF LOS ANGELES )

SUBSCRIBED AND SWORN TO before me  
this 18th day of December, 1980.

/ss/   MARCIA A. LEVIN  
      Notary Public

My Commission expires June 21, 1982

## APPENDIX 12

CAZARES & TOSDAL  
Attorneys at Law  
225 Broadway, Suite 1352  
San Diego, Ca 92101  
Telephone: (714) 233-6581  
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,                     )  
                                                           )  
                          Plaintiffs,                     )  
                                                           )  
                          vs.                                 )  
                                                           )  
CITY OF RIVERSIDE, et al.,                 )  
                                                           )  
                          Defendants.                     )  
\_\_\_\_\_

NO. CV 76-1803-MRP

**SUPPLEMENTAL AFFIDAVIT OF GERALD  
P. LOPEZ IN SUPPORT OF PLAIN-  
TIFFS' MOTION FOR REASONABLE  
ATTORNEYS FEES AND COSTS**

GERALD P. LOPEZ, being duly sworn,  
deposes and says:

1. I am co-counsel for the plain-  
tiffs in the above-captioned action; I



make this affidavit in order to bring to the Court's attention facts relevant to the amount of fees requested in the previously submitted Motion For Reasonable Attorneys Fees and Costs.

2. In my affidavit of December 1, 1980, I stated that as of that time, I had expended 1,265.50 hours on the prosecution of this case. Those hours were expended on the following days and activities:

|         |                                                                                                      |      |
|---------|------------------------------------------------------------------------------------------------------|------|
| 8/25/75 | Conference with Roy B. Cazares (Cazares) re results of trip to Riverside, potential causes of action | 2.00 |
| 8/28/75 | Review internal memo re initial investigation and preliminary research                               | 2.50 |
| 9/3/75  | Research absolute municipal immunity under Federal Civil Rights Act                                  | 3.50 |

|          |                                                                                   |      |
|----------|-----------------------------------------------------------------------------------|------|
| 9/11/75  | Research individual liability                                                     | 2.50 |
| 9/16/75  | Research individual and municipal liability                                       | 3.50 |
| 9/22/75  | Conference with Cazares re: Preliminary research                                  | 2.50 |
| 9/26/75  | Prepare draft of retainer agreement                                               | 2.00 |
| 9/30/75  | Meet with Cazares re Theories of liability and what persons to represent          | 1.50 |
| 10/3/75  | Meet with clients to discuss strategy and explain specifics of retainer agreement | 2.50 |
| 10/9/75  | Draft letter with retainer agreement and proposed steps                           | 2.50 |
| 10/11/75 | Telephone call with J. Rivera                                                     | .50  |
| 10/20/75 | Review letters from Jennie Rivera; note to file                                   | .50  |
| 10/23/75 | Research and prepare admin. complaints; meet with Cazares re same                 | 3.50 |

|          |                                                                                                                                      |      |
|----------|--------------------------------------------------------------------------------------------------------------------------------------|------|
| 10/23/75 | Meet with J. Rivera<br>and M. Flores re pro-<br>gress and new witness-<br>es                                                         | 2.00 |
| 10/29/75 | Trip to Riverside to<br>file administrative<br>complaints, investi-<br>gate, interview wit-<br>nesses                                | 8.50 |
| 10/31/75 | Draft letter and claim<br>against city to Larra-<br>bees                                                                             | 1.50 |
| 11/3/75  | Draft letter to Larra-<br>bee re retainer                                                                                            | 1.00 |
| 11/5/75  | Research availability<br>of Federal Equitable<br>Relief preventing<br>unconstitutional pro-<br>secution of various of<br>our clients | 3.50 |
| 11/7/75  | Research availability<br>of Federal Equitable<br>Relief preventing<br>unconstitutional pro-<br>secution of various of<br>our clients | 2.00 |
| 11/11/75 | Research the Res Judi-<br>cata effects of prior<br>state criminal pro-<br>ceedings on subsequent<br>Federal Civil Rights<br>Claims   | 4.50 |

|          |                                                                                                                                    |      |
|----------|------------------------------------------------------------------------------------------------------------------------------------|------|
| 11/15/75 | Research the Res Judi-<br>cata effects of prior<br>state criminal pro-<br>ceedings on subsequent<br>Federal Civil Rights<br>Claims | 3.50 |
| 11/20/75 | Conference with<br>Cazares re findings of<br>research                                                                              | 1.50 |
| 11/21/75 | Meeting with clients                                                                                                               | 3.50 |
| 11/24/75 | Research effect of<br>stipulation of prob-<br>able cause accompany-<br>ing dismissal of cri-<br>minal prosecution                  | 2.50 |
| 11/25/75 | Conference with<br>Cazares re stipulation<br>of probable cause and<br>effect                                                       | 1.00 |
| 11/28/75 | Review letter from J.<br>Rivera: notes to file                                                                                     | .50  |
| 12/15/75 | Draft receipt for 8<br>photographs requested<br>by Barbara Beck,<br>Riverside P.D.                                                 | 1.00 |
| 12/15/75 | Conversation with<br>Cazares and clients re<br>Riverside's rejection<br>of client's claims                                         | 1.50 |
| 12/16/75 | Review letter from<br>R.S. Paz and telephone<br>call to same                                                                       | 1.00 |

|          |                                                                                                                                  |      |
|----------|----------------------------------------------------------------------------------------------------------------------------------|------|
| 12/24/75 | Review City of Riverside's rejection of clients' claims forwarded by clients with cover letter                                   | .50  |
| 1/7/76   | Research 1983 case law for claims against individuals                                                                            | 3.50 |
| 1/13/76  | Research Joint and Several liability under 1983                                                                                  | 3.00 |
| 1/14/76  | Research rationale and justification for John Doe practice in Ninth Circuit; alternatives in identifying unknown police officers | 3.50 |
| 1/14/76  | Conference with Cazares re John Does                                                                                             | 1.00 |
| 1/17/76  | Research choice of law of provisions 42 U.S.C. § 1988 and relevant cases                                                         | 4.00 |
| 1/28/76  | Meet with Cazares re Insurance Co. request for indemnity and note to file                                                        | .50  |
| 1/28/76  | Conversation with H. J. Fuller re Rivera insurance claim                                                                         | .50  |

|         |                                                                                                                               |      |
|---------|-------------------------------------------------------------------------------------------------------------------------------|------|
| 1/28/76 | Research § 1981 and its potential application to individual defendants and City                                               | 4.00 |
| 2/2/76  | Review letter and information received from Jennie Rivera                                                                     | .50  |
| 2/5/76  | Research §§ 1985 and 1986 application to facts <u>particularly</u> unknown officer failing to prevent unlawful acts of others | 3.00 |
| 2/7/76  | Research §§ 1985 and 1986 application to facts <u>particularly</u> unknown officer failing to prevent unlawful acts of others | 3.50 |
| 2/12/76 | Research Prima Facie case of <b>Bivens</b> -like claim against City                                                           | 2.50 |
| 2/18/76 | Meet with Cazares re <b>Bivens</b> -like claim                                                                                | 1.50 |
| 2/20/76 | Further work on <b>Bivens</b> claim against City                                                                              | 2.00 |
| 3/5/76  | Research state causes of action: False Arrest, Malicious Prosecution, Negligence                                              | 3.50 |

|         |                                                                                                                                      |      |
|---------|--------------------------------------------------------------------------------------------------------------------------------------|------|
| 3/9/76  | Research state causes of action: False Arrest, Malicious Prosecution, Negligence particularly negligence in training and supervision | 2.50 |
| 3/13/76 | Research likelihood of federal court abstention in view of pendent claims                                                            | 3.00 |
| 3/18/76 | Review personal injury literature for analogues to "Constitutional Torts": necessary proof, amounts of recovery, etc.                | 2.50 |
| 3/19/76 | Research case law re damages: proof necessary for various constitutional rights asserted                                             | 3.50 |
| 3/19/76 | Conference with Cazares re pendent state claims and proof of damage                                                                  | 2.00 |
| 3/22/76 | Letters to clients requesting additional specific information and suggesting plan of procedure at end of criminal trial              | 2.50 |
| 3/29/76 | Conference with Cazares and Napoleon                                                                                                 |      |

|         |                                                                                                                                                                         |      |
|---------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
|         | Jones re proof of psychological injury                                                                                                                                  | 1.50 |
| 3/31/76 | Conversation with Psychologist Audrey Weiss                                                                                                                             | 2.00 |
| 4/1/76  | Letter to Riveras re appointments with Audrey Weiss; research re proof of emotional anxiety with respect to constitutional claims of due process First Amendment Rights | 2.00 |
| 4/9/76  | Appointment with Jerome Rivera                                                                                                                                          | 2.50 |
| 4/12/76 | Review letter from Jennie Rivera re chain of custody; research state statutory and common law immunities to various potential claim; any effect on federal claims?      | 5.00 |
| 4/15/76 | Further research of state statutory and common law immunities and defenses                                                                                              | 3.50 |
| 4/19/76 | Telephone conversation with and letter to Riveras re appointment for Donald with Weiss                                                                                  | 1.00 |



|         |                                                                                                                                                                                        |      |
|---------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 4/24/76 | Research obstacles to systemic relief; hiring, training and supervision, community contact, administrative claims procedure, internal police misconduct procedures and related matters | 7.50 |
| 4/28/76 | Meet with Roy to discuss theories of case                                                                                                                                              | 2.50 |
| 4/29/76 | Letter to court requesting subpoenas                                                                                                                                                   | .50  |
| 5/5/76  | Letter to H.J. Fuller re insurance; notes to file                                                                                                                                      | .50  |
| 5/15/76 | Draft complaint                                                                                                                                                                        | 4.50 |
| 5/18/76 | Meet with Larrabees re case                                                                                                                                                            | 2.00 |
| 5/21/76 | Telephone call to Sam Paz re other witnesses and nature of our complaint                                                                                                               | .50  |
| 6/7/76  | Letter to District Court re: filing fee                                                                                                                                                | .25  |
| 6/11/76 | Letter to insurance agent for Riveras                                                                                                                                                  | .25  |
| 6/14/76 | Letter to clients; review additional witness statements                                                                                                                                | 2.00 |

|         |                                                                                                 |      |
|---------|-------------------------------------------------------------------------------------------------|------|
| 6/16/76 | Meet with Cazares re discovery plan: interrogatories and depositions                            | 1.00 |
| 6/21/76 | Letter to process server                                                                        | .25  |
| 6/23/76 | Letter to counsel (representing other plaintiffs) re discovery                                  | .50  |
| 6/23/76 | Letter to U.S. District Court on proof of service                                               | .50  |
| 7/2/76  | Review answer to complaint                                                                      | 2.50 |
| 7/6/76  | Receive and review Notice of Pre-Trial Conference; research various technical procedural issues | 1.50 |
| 7/7/76  | Telephone conversation with J. Ferguson's Clerk re Change of Caption                            | .50  |
| 7/9/76  | Stipulate re change of caption sent to opposing counsel, James Mead                             | 2.50 |
| 7/15/76 | Receive and review complaint #76-1901-R to be low-numbered to J. Ferguson                       | 1.50 |

|         |                                                                                                                                                                                                 |      |
|---------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 7/16/76 | Letter to J. Ferguson<br>re stipulation                                                                                                                                                         | .50  |
| 7/22/76 | Research history (compiled by Riverside citizen) of police-community relations in Riverside for possible use re: pattern and practice, acquiescence with knowledge, racial animas, etc.         | 3.50 |
| 7/27/76 | Reserach history (compiled by Riverside citizen) of police-community relations in Riverside for possible use re: pattern and practice, acquiescence with knowledge, racial animas, etc,: review | 2.50 |
| 8/2/76  | Further research of significant police-community contact in or near Casablanca                                                                                                                  | 3.00 |
| 8/10/76 | Research proof necessary for systemic relief: restructuring dept., Admin. Claims Procedures; Review Rizzo-libel cases                                                                           | 3.50 |
| 8/12/76 | Research proof necessary for systemic relief: restructuring dept., Admin. claims                                                                                                                |      |

|         |                                                                                                                                     |      |
|---------|-------------------------------------------------------------------------------------------------------------------------------------|------|
|         | procedures; Review<br>Rizzo-libel cases                                                                                             | 2.00 |
| 8/18/76 | Further research news-<br>paper account of<br>police-Casablanca<br>contact                                                          | 3.00 |
| 8/24/76 | Conference with<br>Cazares re discovery<br>with respect to<br>police-community rela-<br>tions                                       | 1.50 |
| 8/27/76 | Research newspaper<br>accounts: police Casa-<br>blanca contact                                                                      | 1.50 |
| 9/1/76  | Contact local San<br>Diego police officers<br>as "experts" re police<br>handling of riots;<br>police-community rela-<br>tions, etc. | 2.00 |
| 9/7/76  | Investigate relation-<br>ship of Riverside<br>County D.A. and City<br>of Riverside: Due<br>Process Issues                           | 2.00 |
| 9/15/76 | Review cross-exam<br>notes of criminal<br>defense counsel                                                                           | 3.00 |
| 9/17/76 | Call J. Ferguson's<br>Clerk to continue<br>noticed pretrial con-<br>ference                                                         | .25  |

|          |                                                                                                                                                       |      |
|----------|-------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 9/20/76  | Research statutory and common law view of police reports: purpose? obligation of individual police officer? personal observation alone? group effort? | 2.50 |
| 9/27/76  | Research statutory and common law view of police reports: purpose? obligation of individual police officer? personal observation alone? group effort? | 2.00 |
| 10/4/76  | Prepare for discovery with counsel for other group of plaintiffs                                                                                      | 2.50 |
| 10/8/76  | Prepare for discovery with counsel for other group of plaintiffs                                                                                      | 1.50 |
| 10/15/76 | Prepare "proof charts" and review notes on history; identification at scene; corroborating witnesses for meeting with other counsel                   | 2.50 |
| 10/15/76 | Confer with Cazares re scheduling of discovery, other matters                                                                                         | 1.50 |
| 10/17/76 | Meeting with Cazares and Paz                                                                                                                          | 2.50 |

|          |                                                                                                               |      |
|----------|---------------------------------------------------------------------------------------------------------------|------|
| 10/25/76 | Confer with San Diego with insurance counsel re: typical settlement figures for alleged constitutional injury | 1.50 |
| 10/29/76 | Review jury verdict awards                                                                                    | 1.50 |
| 11/3/76  | Review witness statements compiled immediately after the incident; read jury awards                           | 2.50 |
| 11/11/76 | Review case law for evidence admissible in making out damages for constitutional deprivation                  | 3.50 |
| 11/12/76 | Review case law for evidence admissible in making out damages for constitutional deprivation                  | 3.00 |
| 11/16/76 | Prepare inter office notes re notice of deposition                                                            | 2.00 |
| 11/29/76 | Further work for depositions                                                                                  | 1.50 |
| 11/29/76 | Letters to Riveras re depositions                                                                             | 1.00 |
| 12/9/76  | Further work in preparation for deposition                                                                    | 2.00 |

|          |                                                                                               |      |
|----------|-----------------------------------------------------------------------------------------------|------|
| 12/10/76 | Further work in preparation for deposition                                                    | 2.50 |
| 12/14/76 | Meet with Cazares re: my work in preparation for deposition                                   | 1.50 |
| 12/15/76 | Review information relevant to deposition of individual defendants: prepare notes for Cazares | 3.00 |
| 12/16/76 | Review information relevant to deposition of individual defendants: prepare notes for Cazares | 2.50 |
| 12/17/76 | Review information relevant to deposition of individual defendants; prepare notes for Cazares | 3.00 |
| 12/21/76 | Review information relevant to deposition of individual defendants: prepare notes for Cazares | 4.00 |
| 12/22/76 | Review information relevant to deposition of individual defendants: prepare notes for Cazares | 3.00 |
| 1/5/77   | Preparation of first set of interrogatories                                                   |      |



|         |                                                                                              |      |
|---------|----------------------------------------------------------------------------------------------|------|
|         | to be propounded to<br>defendants                                                            | 6.00 |
| 1/6/77  | Meet with Cazares re<br>upcoming depositions                                                 | 2.00 |
| 1/10/77 | Read and research<br>defendant City of<br>Riverside's 23 page<br>motion to dismiss           | 4.00 |
| 1/13/77 | Meet with Cazares re<br>depositions; prepare<br>notes re witnesses for<br>future reference   | 2.00 |
| 1/15/77 | Research response to<br>City of Riverside's<br>motion to dismiss                             | .50  |
| 1/18/77 | Review and sign stipu-<br>lation to continue<br>pre-trial conference                         | .25  |
| 1/25/77 | Write draft of opposi-<br>tion to City's motion<br>to dismiss                                | 3.50 |
| 1/26/77 | Review draft of oppo-<br>sition                                                              | 3.50 |
| 1/28/77 | Proof read opposition,<br>final check of cita-<br>tions, draft letter to<br>court for filing | 3.00 |
| 1/30/77 | Read correspondence<br>from Kotler re deposi-<br>tions and pretrial<br>conference            | .50  |



|         |                                                                                                                          |      |
|---------|--------------------------------------------------------------------------------------------------------------------------|------|
| 1/31/77 | Read defendants' interrogatories propounded to plaintiffs                                                                | 1.00 |
| 2/2/77  | Draft letter to clients re depositions and interrogatories                                                               | .50  |
| 2/4/77  | Read and research defendant City's supplemental memorandum in support of motion to dismiss: re <u>Aldinger v. Howard</u> | 2.50 |
| 2/4/77  | Read second separate (45 page) motion to dismiss filed by various individual defendants                                  | 3.00 |
| 2/5/77  | Work in preparation of plaintiffs' response to <u>defendants'</u> interrogatories                                        | 6.00 |
| 2/8/77  | Research case law cited by individual defendants in support of their separate motion to dismiss                          | 6.50 |
| 2/10/77 | Research case law cited in support of individual defendants separate motion to dismiss                                   | 3.50 |
| 2/14/77 | Research individual defendants motion to                                                                                 |      |

|         |                                                                                                                                                                           |      |
|---------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
|         | dismiss: Our argument<br>re elements of prima<br>facie §1983 claim                                                                                                        | 3.50 |
| 2/15/77 | Work in preparation of<br>plaintiffs' response<br>to defendants' inter-<br>rogatories                                                                                     | 3.00 |
| 2/15/77 | Confer with Cazares re<br>plaintiffs' response<br>to defendants' inter-<br>rogatories                                                                                     | 1.50 |
| 2/22/77 | Read letter from Sam<br>Paz                                                                                                                                               | .25  |
| 2/23/77 | Research availability<br>of state statutory<br>immunities raised by<br>individual defendants<br>in their motion to<br>dismiss as complete<br>bar to 1983, etc.,<br>claims | 4.00 |
| 2/24/77 | Draft letter to Samuel<br>Paz re continuing<br>defendants' motion to<br>dismiss                                                                                           | .25  |
| 3/3/77  | Draft points and aut-<br>horities in opposition<br>to individual defen-<br>dants' motion to dis-<br>miss                                                                  | 4.00 |

|         |                                                                                                                                                                 |      |
|---------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 3/8/77  | Further preparation of first set of interrogatories to be propounded to defendants                                                                              | 3.00 |
| 3/10/77 | Work in preparation of plaintiffs response to defendants' interrogatories                                                                                       | 7.00 |
| 3/14/77 | Preparation and argument re motion to dismiss                                                                                                                   | 6.50 |
| 3/15/77 | Read and research defendant City's 18 page reply to points and authorities in opposition to defendant City's motion to dismiss: Bivens analogue applied to City | 3.00 |
| 3/16/77 | Research City's reply to our opposing points and authorities                                                                                                    | 2.50 |
| 3/18/77 | Draft letter to Sue Reeves, reporter, re corrections of depositions                                                                                             | .25  |
| 3/24/77 | Read and research individual defendants reply to points and authorities in opposition to individual defendants' motion to dismiss                               | 2.50 |

|         |                                                                                                                                               |      |
|---------|-----------------------------------------------------------------------------------------------------------------------------------------------|------|
| 3/25/77 | Draft argument in response to individual defendants reply to points and authorities in opposition to individual defendants' motion to dismiss | 3.00 |
| 3/27/77 | Prepare for argument on motion of City of Riverside                                                                                           | 3.50 |
| 3/28/77 | Preparation and argument re motion of City of Riverside to dismiss; post-argument notes and notes re discovery strategy                       | 8.00 |
| 3/29/77 | Read Kotler's letter re our response to interrogatories propounded 1/28/77. Review interrogatories in question                                | 2.50 |
| 3/31/77 | Prepare order and accompanying letter denying each and every motion to dismiss brought by defendant City and individual defendants            | 1.00 |
| 4/1/77  | Final work on plaintiffs interrogatories to defendants                                                                                        | 3.50 |
| 4/1/77  | Draft motion to produce for inspection                                                                                                        |      |

|         |                                                                                                     |      |
|---------|-----------------------------------------------------------------------------------------------------|------|
|         | and copying of documents                                                                            | 1.00 |
| 4/6/77  | Draft letter to court re filing of interrogatories and motion to produce for inspection             | .75  |
| 4/6/77  | Draft letter to Ron & Mark Larrabee re interrogatories                                              | .25  |
| 4/7/77  | Review defendants second set of (414) interrogatories to each and every plaintiff (received 4/5/77) | 3.00 |
| 4/11/77 | Work on plaintiffs' response to defendants' second set of interrogatories                           | 3.50 |
| 4/14/77 | Review defendants 35 page motion to require further answers to first set of interrogatories         | 3.00 |
| 4/15/77 | Further work on plaintiff's responses to defendants' second set of interrogatories                  | 6.75 |
| 4/18/77 | Conference with Cazares re defendants' discovery tactics and oppressive interrogatories             | .50  |

|         |                                                                                                      |      |
|---------|------------------------------------------------------------------------------------------------------|------|
| 4/18/77 | Work on motion for a protective order                                                                | 2.50 |
| 4/21/77 | Draft letter to court clerk re Larrabee interrogatories                                              | .25  |
| 4/22/77 | Prepare application for a protective order                                                           | 2.00 |
| 4/25/77 | Prepare application for protective order                                                             | 2.50 |
| 5/5/77  | Draft plaintiffs' memo of points and authorities in opposition to defendants' motion to compel       | 3.50 |
| 5/6/77  | Review defendants response in opposition to plaintiffs' motion to produce for inspection and copying | .50  |
| 5/9/77  | Read Kotler's letter re conference                                                                   | .25  |
| 5/11/77 | Review defendants' points and authorities in opposition to plaintiffs' motion for a protective order | 1.50 |
| 5/16/77 | Preparation for and hearing re motion to require further answers and motion for protective order;    |      |

|         |                                                                                                                                                                                 |      |
|---------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
|         | review stipulation and<br>order re discovery                                                                                                                                    | 5.00 |
| 5/24/77 | Work on plaintiffs'<br>response to defen-<br>dants' second set of<br>(414 x 8) interroga-<br>tories                                                                             | 3.00 |
| 5/25/77 | Review Kotler's letter<br>re date for defen-<br>dants' to respond to<br>interrogatories                                                                                         | .25  |
| 6/2/77  | Draft letter to Larra-<br>bee preparing Mark for<br>deposition                                                                                                                  | 1.50 |
| 6/3/77  | Draft letter to Kotler<br>in response to letter<br>of 5/23/77 re discov-<br>ery                                                                                                 | .75  |
| 6/9/77  | Review Kotler letter<br>dated June 8 re agree-<br>ment on discovery                                                                                                             | .25  |
| 6/17/77 | Preparation for, tra-<br>vel and deposition of<br>Mark Larrabee in Los<br>Angeles                                                                                               | 7.00 |
| 6/19/77 | Work on motion to<br>require further ans-<br>wers and to compel<br>production of docu-<br>ments: deliberately<br>ignored discovery<br>stated and asserted<br>such objections as |      |

|         |                                                                                                                                                                                                                                                                                                                                                                                                                                                        |      |
|---------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
|         | <p>"heresay and inadmissibility of evidence; objected to terminology as "unintelligible" when the term ("<u>neighborhood problem</u>") was employed by <u>defendants not</u> plaintiffs; deliberately avoiding subparts to questions; asserting attorney-client privilege without even attempting to demonstrate that privilege exists and applies; refuse production of documents through blanket assertions of irrelevance and work-product rule</p> | 7.50 |
| 6/21/77 | <p>Work on motion to require further answers and to compel production of documents: etc. (see 6/19/77)</p>                                                                                                                                                                                                                                                                                                                                             | 5.50 |
| 6/23/77 | <p>Work on motion to require further answers and to compel production of documents: etc. (see 6/19/77)</p>                                                                                                                                                                                                                                                                                                                                             | 4.50 |
| 6/28/77 | <p>Telephone conversation with Kristin Belko re Two week extension on</p>                                                                                                                                                                                                                                                                                                                                                                              |      |



|         |                                                                                              |      |
|---------|----------------------------------------------------------------------------------------------|------|
|         | discovery for both sides                                                                     | .25  |
| 6/30/77 | Review Belko's follow up letter                                                              | .25  |
| 6/30/77 | Continue work on plaintiffs' response to defendants' second set of interrogs.                | 5.50 |
| 7/1/77  | Continue work on plaintiff's response to defendants' (414 x 8) second set of interrogatories | 4.50 |
| 7/2/77  | Continue work on plaintiffs' response to defendants' (414 x 8) second set of interrogatories | 3.00 |
| 7/3/77  | Continue work on plaintiffs' response to defendants' (414 x 8) second set of interrogatories | 6.00 |
| 7/5/77  | Continue work on plaintiffs' response to defendants' (414 x 8) second set of interrogatories | 4.00 |
| 7/6/77  | Continue work on plaintiffs' response to defendants' (414 x 8) second set of interrogatories | 3.50 |

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| 7/12/77 | Draft letter to Larabee's re deposition                                                                                                                 | .25  |
| 7/21/77 | Draft letter to Larra-bees on response to second set of interrogatories propounded by defendants                                                        | .25  |
| 7/21/77 | Draft letter to L. Rivera                                                                                                                               | .25  |
| 7/21/77 | Review defendants 58 page memo of points and authorities in opposition to plaintiffs' motion to compel                                                  | 4.50 |
| 7/25/77 | Review defendant City of Riverside's response to plaintiffs' interrogatories                                                                            | 2.50 |
| 7/27/77 | Research objections (unsupported) interposed by City to plaintiffs' interrogs.                                                                          | 3.50 |
| 7/28/77 | Research various positions asserted (but unexplained and unsupported) by defendants in their 58 page memo in opposition to plaintiffs' motion to compel | 5.00 |

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| 8/3/77  | Draft letter to U.S. District Court re: verifications                                           | .25  |
| 8/3/77  | Research motion to require further answer of City to plaintiffs' interrogatories                | 4.50 |
| 8/5/77  | Review defendants' motion for summary judgment, 23 affidavits                                   | 2.00 |
| 8/6/77  | Draft motion to require further answers of City of Riverside. To be heard 9/12/77               | 3.00 |
| 8/8/77  | Further research individual defendants' positions in opposition to plaintiffs' motion to compel | 3.50 |
| 8/10/77 | Letter to J. Rivera re: updated witness list                                                    | .25  |
| 8/11/77 | Research defendants' motion for summary judgement                                               | 4.50 |
| 8/16/77 | Conversation with Kotler re plaintiffs' answer to interrogatories and other discovery           | .25  |

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| 8/18/77 | Work on opposition to defendant's motion for summary judgment                                   | 3.00 |
| 8/19/77 | Confer with Cazares re opposition to summary judgment                                           | 1.00 |
| 8/25/77 | Research and draft reply memorandum in support of motion to compel                              | 2.50 |
| 8/26/77 | Research and draft reply memorandum in support of motion to compel                              | 3.00 |
| 8/29/77 | Draft letter to H.J. Fuller re insurance claim                                                  | .25  |
| 8/31/77 | Draft letter to court                                                                           | .25  |
| 8/31/77 | Work on opposition to defendants' motion for summary judgment                                   | 2.00 |
| 9/2/77  | Work on stipulation regarding issues remaining to be determined re plaintiffs' motion to compel | 4.00 |
| 9/6/77  | Draft letter accompanying stipulation re issues re motion to compel discovery                   | .25  |

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| 9/6/77  | Draft opposition to defendants' motion for summary judgment and statement of genuine issues                                                                                                                        | 4.00 |
| 9/7/77  | Draft statement of genuine issues in compliance with local rules                                                                                                                                                   | 3.00 |
| 9/12/77 | Preparation for and oral argument re motion to compel and review defendants' response to plaintiffs' reply memo; further work (post hearing) in discovery and opposition to summary judgment and things to be done | 8.00 |
| 9/18/77 | Research and draft supplemental points and authorities in opposition to defendants' motion for summary judgment                                                                                                    | 2.00 |
| 9/22/77 | Review City's opposition to plaintiffs' motion to compel further answers                                                                                                                                           | 2.00 |
| 9/23/77 | Draft letter to Kotler re authorizations of J. Rivera and L. Rivera                                                                                                                                                | .25  |

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| 9/23/77 | Review defendants' reply to points and authorities in opposition to motion for summary judgment                       | 2.00 |
| 9/25/77 | Research City's opposition to plaintiffs' motion to compel                                                            | 3.50 |
| 9/25/77 | Research City's opposition to plaintiffs' motion to compel                                                            | 3.50 |
| 9/25/77 | Prepare for hearing-research City's new opposition                                                                    | 2.00 |
| 9/26/77 | Hearing (preparation and argument) re motions                                                                         | 7.00 |
| 9/27/77 | Draft affidavits for second opposition to defendants' additional affidavits                                           | 4.50 |
| 9/28/77 | Further work on affidavits; research further points and authorities and draft further opposing points and authorities | 7.00 |
| 9/29/77 | Confer with Cazares re all outstanding motions                                                                        | 3.00 |

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| 9/30/77  | Draft letter to Larra-<br>bee re Mark's affida-<br>vit                                                                                                       | .25  |
| 9/30/77  | Review supplemental<br>affidavits in support<br>of summary judgment                                                                                          | .50  |
| 9/30/77  | Final work on stipula-<br>tion re 7 issues re-<br>maining to be deter-<br>mined with regard to<br>plaintiffs' motion to<br>compel production of<br>documents | 2.00 |
| 10/3/77  | Research and draft<br>stipulation re issues<br>with regard to plain-<br>tiffs' motion to com-<br>pel further answers to<br>defendant City of<br>Riverside    | 6.00 |
| 10/5/77  | Review letter and<br>stipulation from Kot-<br>ler                                                                                                            | .25  |
| 10/5/77  | Review letter from<br>notary in Riverside                                                                                                                    | .25  |
| 10/13/77 | Review defendants'<br>response to plain-<br>tiffs' points and<br>authorities in res-<br>ponse to defendants'<br>second set of affida-<br>vits                | 2.50 |

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| 10/14/77 | Research for summary judgment argument                                                                                                                                                             | 3.00 |
| 10/14/77 | Review all discovery and all affidavits re motion for summary judgment                                                                                                                             | 7.00 |
| 10/15/77 | Preparation for oral argument                                                                                                                                                                      | 3.50 |
| 10/16/77 | Preparation for oral argument on 10/17                                                                                                                                                             | 4.00 |
| 10/17/77 | Preparation for and argument re plaintiffs' motion to compel further answers of City and defendants' motions for summary judgment; further work post argument re additional discovery and strategy | 8.00 |
| 11/7/77  | Review defendants' motion to compel further answers to defendants' second set of interrogatories                                                                                                   | 2.50 |
| 11/15/77 | Review affidavit submitted by defendants' in response to motion to require further answer; research claim by defendants                                                                            | 2.50 |
| 11/14/77 | Draft final stipulation re motion to                                                                                                                                                               |      |



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|          | require further answer<br>of City pursuant to<br>oral agreement in<br>court on 10/17/77                                                      | 2.50 |
| 11/17/77 | Draft letter to court<br>with accompanying<br>stipulation re motion<br>to compel further<br>answer of City                                   | 2.00 |
| 11/17/77 | Review defendants'<br>motion to compel fur-<br>ther answer to defen-<br>dants' second set of<br>interrogatories                              | 2.00 |
| 11/30/77 | Read letter from<br>Kotler re authoriza-<br>tions                                                                                            | .25  |
| 12/2/77  | Read letter from Kot-<br>ler re stipulation                                                                                                  | .25  |
| 12/8/77  | Draft letter to Kotler<br>and Belko re meeting<br>re stipulation                                                                             | .25  |
| 12/8/77  | Draft plaintiffs'<br>opposition to defen-<br>dants' motion to com-<br>pel further answers to<br>defendants' second set<br>of interrogatories | 4.50 |
| 12/19/77 | Preparation for and<br>work on stipulation re<br>issues remaining to be<br>determined with res-<br>pect to defendant's                       |      |

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|         | motion to compel further answers to defendants' second set of interrogatories                    | 3.00  |
| 1/9/78  | Preparation for an argument in hearing re defendants motion to compel; work on further discovery | 7.00  |
| 1/24/78 | Draft letter to Kotler re documents requested in motion to produce                               | .25   |
| 1/24/78 | Review taxing of costs filed by Kotler; call court clerk; research challenge                     | 3.50  |
| 1/25/78 | Research motion pursuant to rule 54(d) Fed. R. Civ. P.                                           | 3.00  |
| 1/26/78 | Research recently decided cases; conference with Cazares                                         | 5.00  |
| 1/30/78 | Research legislative history                                                                     | 6.00  |
| 1/31/78 | Draft motion                                                                                     | 2.50  |
| 2/3/78  | Interview witnesses in Riverside                                                                 | 10.00 |
| 2/6/78  | Draft letter to J. Rivera re witnesses and newspaper clippings                                   | .25   |

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| 2/7/78  | Review letter for Kotler re taxing of costs                                                            | .25  |
| 2/9/78  | Confer with Cazares re possible expert testimony                                                       | 1.00 |
| 2/9/78  | Draft letter to Professor Mirande as expert witness                                                    | .50  |
| 2/13/78 | Review court's order re plaintiffs motion to compel; research courts view of Rizzo                     | 3.50 |
| 2/27/78 | Confer with Cazares re upcoming depositions                                                            | 1.00 |
| 3/1/78  | Review defendants' response to motion objecting to the imposition and taxing of costs                  | 1.00 |
| 3/5/78  | Prepare for argument                                                                                   | 2.50 |
| 3/6/78  | Preparation for argument re plaintiffs' motion re taxing of costs - granted; further work on discovery | 7.00 |
| 3/9/78  | Preparation of order and accompanying letter to court                                                  | 1.00 |
| 3/10/78 | Work on plaintiffs' response to defendants                                                             |      |

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|         | second set of interrogatories (as amended by court)                                                                                          | 3.50 |
| 3/21/78 | Research: police-community relations: prototype vis a vis Riverside re proof and injunctive relief                                           | 3.50 |
| 3/22/78 | Research: police-community relations: prototype vis a vis Riverside re proof and injunctive relief                                           | 4.00 |
| 3/27/78 | Letters to J. Rivera, et al., re plaintiffs' response                                                                                        | .50  |
| 4/4/78  | Review defendant City's further answers to interrogatories                                                                                   | .50  |
| 4/7/78  | Review Plaitt, Smith, Eltringham, Olsen, Brading, et al., further answers to interrogatories; compare with existing information for accuracy | 3.50 |
| 4/8/78  | Prepare notes for deposition and further discovery of various individual defendants                                                          | 6.00 |
| 4/19/78 | Confer with Cazares re Pattern and Practice of City of Riverside                                                                             | 1.00 |

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| 4/10/78 | Draft further interrogatories to defendant City, Research Rizzo-like discovery                                                                                                           | 4.50 |
| 5/2/78  | Draft letter to Kotler re inadequacy of individual defendants responses to interrogatories                                                                                               | 3.00 |
| 5/3/78  | Served with Civil Complaint for malicious prosecution filed by Kotler on behalf of dismissed defendants naming clients and ourselves as defendants; research and conference with Cazares | 3.50 |
| 5/4/78  | Letter to Kotler re missing items ordered by Court                                                                                                                                       | .50  |
| 5/5/78  | Telephone conference with Kotler re 5/2/ information                                                                                                                                     | .50  |
| 5/5/78  | Draft follow-up letter to Kotler                                                                                                                                                         | .25  |
| 5/5/78  | Research federal removal provisions                                                                                                                                                      | 3.50 |
| 5/6/78  | Review court ordered further answers and reports                                                                                                                                         | 5.00 |

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| 5/8/78  | Read Kotler's letter<br>re telephone conference                                                      | .25  |
| 5/8/78  | Research federal removal provisions; relevant case law                                               | 4.50 |
| 5/13/78 | Research removal provisions, relevant case law                                                       | 5.00 |
| 5/15/78 | Conference with<br>Cazares re removal and<br>motion to dismiss and<br>motion for summary<br>judgment | 2.00 |
| 5/16/78 | Draft removal petition<br>and affidavits; prepare bond                                               | 3.00 |
| 5/18/78 | Review Kotler's letter<br>re possible stipulation                                                    | .25  |
| 5/19/78 | Research Motion to<br>Dismiss/motion for<br>summary judgment of<br>removal successful                | 7.00 |
| 5/23/78 | Draft motion to dismiss/motion re summary judgment and affidavit                                     | 4.50 |
| 5/23/78 | Discuss removal with clients                                                                         | 1.50 |
| 5/24/78 | Discuss removal with clients                                                                         | 1.50 |

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| 5/25/78 | Final work on motion to dismiss/motion for summary judgment                                                                                    | 3.00 |
| 5/31/78 | Discuss motions with clients                                                                                                                   | 2.50 |
| 5/31/78 | Review Kotler letter "Line Memos" of individual defendants                                                                                     | 1.00 |
| 6/6/78  | Review motion to remand; research                                                                                                              | 1.50 |
| 6/7/78  | Research and draft points and authorities in opposition to motion to remand                                                                    | 3.50 |
| 6/13/78 | Draft letter to court accompanying opposition to motion to remand                                                                              | .25  |
| 6/16/78 | Review response to motion for summary judgment; research case law cited; review affidavits, filed                                              | 4.50 |
| 6/17/78 | Review response to motion for summary judgment; research case law cited; review affidavits; compare with affidavits filed in support of motion | 6.00 |
| 6/23/78 | Review defendants' response to opposition                                                                                                      |      |

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|         | to defendants motion<br>to remand; note defen-<br>dants' use of <b>Sweeney</b>                                                                                                                 | 1.00 |
| 7/10/78 | Review individual de-<br>fendants' supplemental<br>answers to interroga-<br>tories and City's<br>supplemental further<br>answer                                                                | 3.00 |
| 7/11/78 | Review individual de-<br>fendants' supplemental<br>answers to interroga-<br>tories and City's<br>supplemental further<br>answers and prepare<br>questions and items of<br>additional discovery | 4.50 |
| 7/14/78 | Read and study defen-<br>dant City's answers to<br>second set of interro-<br>gatories                                                                                                          | 2.50 |
| 7/15/78 | Read and study defen-<br>dant City's answers to<br>second set of interro-<br>gatories                                                                                                          | 3.50 |
| 8/8/78  | Review individual de-<br>fendants' answers to<br>second set of interro-<br>gatories; notes for<br>further discovery                                                                            | 5.00 |
| 8/9/78  | Review individual de-<br>fendants' answers to<br>second set of interro-<br>gatories; notes for<br>further discovery                                                                            | 4.50 |



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| 8/9/78  | Draft request for production of documents and motion to compel further answer of Chief Ferguson and City of Riverside               | 2.75 |
| 8/10/78 | Confer with Cazares re further discovery: review discovery to date, further needs, etc.                                             | 2.00 |
| 8/16/78 | Review Kotler's letter re supplemental answers of defendant City                                                                    | .25  |
| 8/16/78 | Review: compare & contrast all defendants' responses re: unfolding events with respect to probable cause and other relevant facts   | 6.50 |
| 8/17/78 | Review: compare and contrast all defendants' responses re: unfolding events with respect to probable cause and other relevant facts | 5.00 |
| 8/18/78 | Review: compare and contrast all defendants' responses re: unfolding events with respect to probable cause and other relevant facts | 3.00 |

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| 8/19/78 | Prepare for motion to remand/motion for summary judgment hearing                                                             | 5.00 |
| 8/20/78 | Prepare for hearing; review notes and case law                                                                               | 4.50 |
| 8/21/78 | Preparation and argument, prepare order                                                                                      | 4.00 |
| 8/22/78 | Review all documents relevant to Olsen deposition; notes for Cazares                                                         | 3.00 |
| 8/28/78 | Review defendant Ferguson's answers to second set of interrogatories; further questions and compare with responses of others | 2.50 |
| 9/5/78  | Review City's response to interrogatory No. 28: operational plan-Casablanca                                                  | 3.00 |
| 9/6/78  | Research typicality of such operational plans re: proof and equitable relief                                                 | 4.50 |
| 9/18/78 | Review Kotler letter re PTC; conversation with Cazares                                                                       | 2.50 |

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| 9/19/78  | Review defendants' motion to amend order                                                                                                             | 1.50 |
| 9/25/78  | Preparation for and argument re defendants' motion to amend order; discussion with Kotler re deposition of Chief Ferguson; further work on discovery | 4.50 |
| 9/26/78  | Draft order denying motion to amend previous order and accompanying letter                                                                           | .50  |
| 9/26/78  | Review and prepare notes for Cazares re Eltringham deposition                                                                                        | 2.50 |
| 11/27/78 | Review documents, all discovery and witness statements relevant to depositions of Innskeep and Webster: Notes to Cazares                             | 3.00 |
| 11/28/78 | Review documents, all discovery and witness statements relevant to depositions of Innskeep and Webster: notes to Cazares                             | 2.00 |
| 11/30/78 | Review documents, discovery and statements re defendant Smith: notes to Cazares                                                                      | 1.00 |

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| 12/1/78  | Investigative trip to<br>Riverside: meet with<br>witnesses                                                               | 7.00 |
| 12/2/78  | Investigative trip to<br>Riverside: meet with<br>witnesses                                                               | 4.50 |
| 12/11/78 | Conversation with<br>Cazares re depositions                                                                              | .50  |
| 12/14/78 | Review relevant docu-<br>ments, discovery,<br>statements Police<br>Manual re Ferguson<br>deposition: notes to<br>Cazares | 3.00 |
| 12/15/78 | Review relevant docu-<br>ments, discovery,<br>statements Police<br>Manual re Ferguson<br>deposition: notes to<br>Cazares | 3.50 |
| 1/8/79   | Research contentions<br>of law and instruc-<br>tions                                                                     | 2.00 |
| 1/11/79  | Research contentions<br>of law and instruc-<br>tions                                                                     | 2.50 |
| 1/12/79  | Research contentions<br>of law and instruc-<br>tions                                                                     | 2.00 |
| 1/13/79  | Research contentions<br>of law and instruc-<br>tions                                                                     | 3/50 |

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| 1/18/79 | Research tear gas<br>grenades: expert                                    | 2.50 |
| 1/22/79 | Telephone conversation<br>with Cazares                                   | .25  |
| 1/23/79 | Work on pre trial<br>order and memo of<br>contentions of fact<br>and law | 4.00 |
| 1/24/79 | Work on pretrial order<br>and memo of conten-<br>tions of fact and law   | 5.00 |
| 1/25/79 | Work on pretrial order<br>and memo of conten-<br>tions of fact and law   | 4.00 |
| 1/26/79 | Work on pretrial order<br>and memo of conten-<br>tions of fact and law   | 5.00 |
| 1/27/79 | Work on pretrial order<br>and memo of conten-<br>tions of fact and law   | 7.00 |
| 1/28/79 | Work on pretrial order<br>and memo of conten-<br>tions of fact and law   | 3.00 |
| 1/29/79 | Work on pretrial order<br>and memo of conten-<br>tions of fact and law   | 6.00 |
| 1/30/79 | Work on pretrial order<br>and memo of conten-<br>tions of fact and law   | 6.75 |

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| 1/31/79 | Work on pretrial order and memo of contentions of fact and law                                                                          | 7.00 |
| 2/1/79  | Meet with Cazares in preparation for meeting with Kotler; work on preparation of pretrial order and memo of contentions of fact and law | 5.00 |
| 2/2/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 4.50 |
| 2/3/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 5.75 |
| 2/4/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 4.25 |
| 2/5/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 7.00 |
| 2/6/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 6.50 |
| 2/20/79 | Preparation for hearing on 2/26                                                                                                         | 3.00 |
| 2/26/79 | Preparation for and pretrial conference                                                                                                 | 5.00 |
| 3/7/79  | Study discovery and witnesses statement                                                                                                 |      |

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|         | for trial notes and organization                                               | 3.00 |
| 3/10/79 | Study discovery and witnesses statement for trial notes and organization       | 4.50 |
| 3/12/79 | Review defendants objections to plaintiffs' issue to be litigated at trial     | 2.00 |
| 3/14/79 | Review defendants objections to plaintiffs' issue to be litigated at trial     | 1.00 |
| 3/14/79 | Research: all recent Circuit Cases or LEXIS                                    | 5.00 |
| 3/15/79 | Research all Circuit cases                                                     | 3.50 |
| 3/18/79 | Research all Circuit cases plaintiffs' Supplemental Memo of Law                | 4.50 |
| 3/19/79 | Further research; draft supplemental memorandum of law                         | 5.00 |
| 3/20/79 | Draft supplemental memorandum of law                                           | 3.00 |
| 3/23/79 | Work re witnesses (friends and police officers) necessary for prima facie case | 2.00 |



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| 4/5/79  | Review defendants' response to plaintiffs' supplemental memo of law | 1.50 |
| 4/6/79  | Review Kotler affidavit                                             | .50  |
| 4/7/79  | Preparation for 4/9 hearing                                         | 3.00 |
| 4/8/79  | Preparation for 4/9 hearing                                         | 3.50 |
| 4/9/79  | Preparation for and hearing before Court                            | 5.50 |
| 4/12/79 | Preparation for hearing 4/16                                        | 3.00 |
| 4/14/79 | Preparation for hearing 4/16                                        | 4.00 |
| 4/16/79 | Preparation for and hearing before Court                            | 5.00 |
| 4/18/79 | Research for second supplemental memo of law                        | 3.50 |
| 4/20/79 | Research for second supplemental memo of law                        | 3.00 |
| 4/21/79 | Research for second supplemental memo of law                        | 3.00 |
| 4/23/79 | Research for second supplemental memo of law and first draft of     |      |



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|         | second supplemental<br>memo of law                                                                         | 5.00 |
| 4/24/79 | Complete writing of<br>plaintiffs' second<br>supplemental memo of<br>law                                   | 5.00 |
| 4/26/79 | Prepare litigation<br>charts for trial                                                                     | 3.50 |
| 4/28/79 | Prepare litigation<br>charts for trial                                                                     | 2.00 |
| 5/2/79  | Review discovery re<br>all defendants' incon-<br>sistencies relevant to<br>prima facie case and<br>defense | 3.50 |
| 5/3/79  | Review discovery re<br>all defendants' incon-<br>sistencies relevant to<br>prima facie case and<br>defense | 4.00 |
| 5/4/79  | Review discovery re<br>all defendants' incon-<br>sistencies relevant to<br>prima facie case and<br>defense | 2.00 |
| 5/9/79  | Read recent case law<br>re proof                                                                           | 3.00 |
| 5/16/79 | Review defendants'<br>response to plain-<br>tiffs' second supple-<br>mental memo law; re-<br>search        | 2.00 |

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| 5/21/79  | Research defendants' response                                                                | 4.00 |
| 5/24/79  | Review defendants' motion to dismiss for failure to prosecute                                | 1.50 |
| 6/15/79  | Draft affidavit in opposition to defendants' motion to dismiss, meet with co-counsel re case | 3.00 |
| 6/26/79  | Review affidavit of Kotler in support of motion to dismiss                                   | .50  |
| 7/9/79   | Research for defendants' appeal of dismissal                                                 | 3.50 |
| 7/10/79  | Draft appellee brief                                                                         | 2.50 |
| 7/16/79  | Review defendants' objection to modified plaintiffs' exhibit list                            | .50  |
| 10/19/79 | Telephone conference with Cazares re settlement conference                                   | .50  |
| 12/13/79 | Preparation for and conference with Cazares reviewing entire case for trial                  | 6.00 |
| 12/17/79 | Review witnesses statement: notes and elements of claims                                     | 2.00 |

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| 12/19/79 | Review witnesses statement: notes and elements of claims                                                     | 2.50 |
| 2/4/80   | Conference with Cazares re status conference                                                                 | 1.00 |
| 2/14/80  | Research use of statistical data provided by defendant City re pattern and practice/ or 1985 and 1986 claims | 3.00 |
| 2/15/80  | Research use of statistical data provided by defendant City re pattern and practice/ or 1985 and 1986 claims | 2.50 |
| 2/20/80  | Draft supplemental memo of contentions of law                                                                | 1.50 |
| 3/4/80   | Review and revise chart of prima facie cases                                                                 | 2.50 |
| 3/6/80   | Review and revise chart of prima facie cases                                                                 | 2.00 |
| 3/7/80   | Review witnesses' statements re elements of claim/defense                                                    | 3.00 |
| 3/8/80   | Preparation for and conference with                                                                          |      |

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|         | Cazares in Los Angeles: trial preparation                                                             | 4.50 |
| 3/11/80 | Research for jury instructions                                                                        | 4.00 |
| 3/13/80 | Research for jury instructions                                                                        | 3.00 |
| 3/14/80 | Research for jury instructions                                                                        | 3.50 |
| 3/18/80 | Draft jury instructions                                                                               | 3.00 |
| 3/19/80 | Draft jury instructions                                                                               | 3.50 |
| 3/21/80 | Informed that trial re-set for 6/30/80/telephone                                                      | .25  |
| 4/18/80 | Work on instructions; joint and several liability concept-res ipsa and other burden shifting concepts | 2.00 |
| 4/22/80 | Work on instructions; joint and several liability concept-res ipsa and other burden shifting concepts | 3.00 |
| 4/30/80 | Review police operating manual re violations: notes to file                                           | 2.00 |
| 5/1/80  | Research and draft instructions                                                                       | 2.50 |

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| 5/2/80  | Research and draft instructions                                            | 3.00 |
| 5/6/80  | Review and research strict liability for City: constitutional implications | 2.50 |
| 5/7/80  | Review and research strict liability for City: constitutional implications | 3.00 |
| 5/8/80  | Review final argument structure: chart on what facts look like             | 2.00 |
| 5/16/80 | Review witnesses statements                                                | 1.50 |
| 5/19/80 | Review witnesses statements                                                | 2.50 |
| 5/21/80 | Review discovery-individual activity                                       | 2.50 |
| 5/22/80 | Review discovery-inconsistencies                                           | 3.00 |
| 8/25/80 | Research and draft instructions                                            | 3.00 |
| 9/7/80  | Research most recent Monell case law                                       | 2.50 |
| 9/10/80 | Research most recent damages-relevant evidence Carey issues                | 3.00 |

|         |                                                                                                     |      |
|---------|-----------------------------------------------------------------------------------------------------|------|
| 9/14/80 | Review police reports and discovery in preparation for conference with Cazares                      | 4.50 |
| 9/15/80 | Preparation for and conference with Cazares                                                         | 6.50 |
| 9/16/80 | Preparation for and conference with Cazares                                                         | 3.50 |
| 9/17/80 | Confer and prepare with Cazares re order of proof elements of cause of action; potential dismissals | 4.50 |
| 9/18/80 | Confer and prepare: use of firearms, tear gas, etc.                                                 | 4.50 |
| 9/19/80 | Research for special instructions                                                                   | 2.50 |
| 9/20/80 | Research for special instructions                                                                   | 5.50 |
| 9/21/80 | Research for special instructions                                                                   | 5.00 |
| 9/22/80 | Research for special instructions                                                                   | 3.50 |
| 9/23/80 | Conference and prepare: police reports and depositions for cross-examination,                       |      |

|          |                                                                           |      |
|----------|---------------------------------------------------------------------------|------|
|          | review defendants'<br>jury instructions                                   | 4.50 |
| 9/23/80  | Confer and prepare<br>particulars re special<br>jury instructions         | 5.00 |
| 9/24/80  | Draft idea for<br>Cazares' final argu-<br>ment in view of testi-<br>mony  | 5.50 |
| 9/25/80  | Draft ideas for<br>Cazares' final argu-<br>ment in view of testi-<br>mony | 4.00 |
| 9/26/80  | Confer re final argu-<br>ment                                             | 1.50 |
| 9/29/80  | Research on judgment<br>NOV                                               | 3.50 |
| 9/30/80  | Research on judgment<br>NOV; draft arguments                              | 4.00 |
| 11/6/80  | Research motion for<br>attorneys fees                                     | 3.00 |
| 11/7/80  | Research motion for<br>attorneys fees                                     | 4.00 |
| 11/12/80 | Draft points and aut-<br>horities                                         | 4.00 |
| 11/14/80 | Draft points and aut-<br>horities                                         | 1.50 |
| 11/15/80 | Review time sheets                                                        | 4.50 |

11/28/80 Work on attorney fee  
motion; review time  
sheet and draft affi-  
davit 8.00

TOTAL HOURS: 1,265.50

Executed this 6th day of Janu-  
ary, 1981, at San Diego, California.

/ss/Gerald P. Lopez  
GERALD P. LOPEZ

STATE OF CALIFORNIA )  
COUNTY OF SAN DIEGO ) ss.

SUBSCRIBED AND SWORN TO  
before me this 6th day of January, 1981,  
at San Diego, California.

/ss/Marianne V. Roiz  
Notary Public in and for  
said County and State

Official Seal  
MARIANNE V. ROIZ  
Notary Public - California  
My Seal Expires July 15, 1982



## APPENDIX 13

KOTLER & KOTLER  
JONATHAN KOTLER  
PATTI ANN KOTLER  
8500 Wilshire Blvd.  
Suite 903  
Beverly Hills, CA 90211  
(213) 652-6273  
Attorneys for Defendants

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,                     )  
                                                           )  
                  Plaintiffs,                     )  
                                                           )  
                  v.                                     )  
                                                           )  
CITY OF RIVERSIDE, et al.,                 )  
                                                           )  
                  Defendants.                     )  
                                                           )

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No. CV 76-1803-MRP

**DEFENDANTS' SUPPLEMENTAL MEMORAN-  
DUM OF POINTS AND AUTHORITIES IN  
RESPONSE TO MOTION BY PLAINTIFFS  
FOR ATTORNEYS FEES AND COSTS AND  
IN SUPPORT OF MOTION BY DEFEN-  
DANTS FOR ATTORNEYS FEES AND  
COSTS.**

MEMORANDUM OF  
POINTS AND AUTHORITIES

INTRODUCTION

On or about January 8, 1981, Fee-Petitioners in the above entitled matter submitted three additional documents in support of their motion for attorneys fees:

1. Affidavit of Robert L. Winslow in Support of Plaintiffs Motion for Reasonable Attorneys Fees and Costs;
2. Supplemental Affidavit of Gerald P. Lopez in support of Plaintiffs Motion for Reasonable Attorneys Fees and Costs; and
3. Opposition to Defendants Motion for Reasonable Attorneys Fees and Costs.

What follows is Defendants' brief response to the above documents.

#### POINTS AND AUTHORITIES

##### 1.

THE AFFIDAVIT OF ROBERT L. WINSLOW IS OBJECTED TO ON THE GROUNDS THAT IT IS IRRELEVANT, AFFIANT LACKS PERSONAL KNOWLEDGE, AND IT IS REplete WITH HEARSAY.

Under Rule 401 of the Federal Rules of Evidence "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evidence which is not relevant is not admissible (F.R.E. 402). Although Mr. Winslow outlines a range of attorney rates, nowhere in Mr. Winslow's Affidavit does he state the amount that these

particular attorneys charge. Courts have construed **Johnson v. Georgia Highway Express, Inc.**, 488 F.2d 714, 717-719 (5th Cir. 1974) to require "what is needed is the customary fee charged by these particular lawyers." **Preston v. Mandeville**, 451 F. Supp. 617 (S.D. Ala. 1978). Mr. Winslow's Affidavit is therefore irrelevant on the issue of reasonable attorneys fees in this particular case.

Rule 602 of the Federal Rules of Evidence requires that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Paragraphs four and five of Mr. Winslow's Affidavit (the only paragraphs of his affidavit which refer to

Messrs. Lopez and Cazares with particularity), consist of Mr. Winslow's opinion based upon what he has been told. Nowhere in Mr. Winslow's affidavit does he assert that he has actually observed Messrs. Lopez or Cazares in the courtroom. Nowhere in his affidavit does he state that he has read any work product produced by Messrs. Lopez or Cazares. In short, Mr. Winslow, apparently, has had no opportunity to observe and perceive the facts which he sets forth by his own senses. Mr. Winslow simply lacks personal knowledge which is required for the proper admission of an affidavit as evidence in an action.

As this Honorable Court would be quick to recognize, the number of years that an attorney has practiced, and the law school from which he has graduated,

taken alone, are not determinative of the proper reasonable hour billing rate for that person. In this case it is for this Honorable Court, not Robert L. Winslow, to determine the proper and reasonable billing rate for the attorneys involved. There is little doubt that this Honorable Court is qualified to determine intelligently and to the best possible degree this particular issue without enlightenment from Mr. Winslow.

Paragraphs four and five of Mr. Winslow's affidavit (the only paragraphs in his affidavit which refer directly to Mr. Cazares and Mr. Lopez) contain nothing but hearsay. These paragraphs set forth the education, the number of years in practice, the specialization, and the activities of Messrs. Cazares and Lopez,

offered in evidence to prove the truth of the matter asserted, based upon facts of which Mr. Winslow has apparently been informed, but has no personal knowledge. Neither of these paragraphs should be admitted by this Court.

2.

MR. LOPEZ' HOURS MUST BE REDUCED  
BECAUSE OF HIS FAILURE TO KEEP  
CONTEMPORANEOUS TIME RECORDS.

Mr. Lopez submitted a lengthy supplemental affidavit purportedly setting forth the number of hours expended on this case.

Mr. Lopez, however, has failed to state that the time list he submitted was kept contemporaneously. Based upon the character of many of the entries on Mr. Lopez' list, i.e. "Read second separate (45 page) motion to dismiss



filed by various individual defendants." (page 9, lines 9-10); "Work on motion to require further answers and to compel production of documents: deliberately ignored discovery stated and asserted such objections as 'hearsay' and 'inadmissability of evidence; objected to terminology as 'unintelligible" when the term 'neighborhood problem' was employed by defendants not plaintiffs; deliberately avoiding sub-parts to questions; asserting attorney-client privilege without even attempting to demonstrate that privilege exists and applies: refuse production of documents through blanket assertions of irrelevance of work product rule" (Page 12, lines 7-13); "Preparation for argument re Plaintiffs' motion re taxing of costs--

granted; further work on discovery"  
(Page 17, lines 14-15)

Each of the above entries indicates that the entry was not made contemporaneously with the event. This is particularly true of the last example noted wherein Mr. Lopez indicates that the Plaintiffs' motions re taxing of costs was granted as the date of 3/6/78 when he was making his preparation for argument. The other entries are simply editorial comments unlikely to have been made at the time the work was allegedly being done. Why would an attorney indicate how many pages a motion has on a time sheet, or how many interrogatories he received? Such comments are clearly designed for the benefit of this Honorable Court in the instant motion for attorneys fees. *Heigler v. Gatter*, 463

F.Supp. 802 (E.D. Pa. 1978) directs that any figure that Mr. Lopez has reconstructed is suspect and must be reduced approximately 20% because of his failure to keep contemporaneous time records.

3.

BECAUSE PLAINTIFFS' CLAIMS AGAINST DEFENDANTS WERE FRIVOLOUS, UNREASONABLE OR WITHOUT FOUNDATION, DEFENDANTS ARE ENTITLED TO AN AWARD OF ATTORNEYS FEES UNDER THE CIVIL RIGHTS ACT.

Plaintiffs' opposition to Defendants' motion for reasonable attorneys fees and costs re: the granting of 18 Summary Judgments, misses the focal point of Defendants' contention: Plaintiffs simply neglected to engage in any discovery or investigation which would have enabled them to determine the proper defendants in such a lawsuit. As the

affidavits of Gerald P. Lopez and Roy B. Cazares clearly point out, Mr. Lopez and Mr. Cazares began working on this case on August 21, 1975. The Complaint was filed by them on June 6, 1976. Nearly a year passed from that time that the attorneys first met with their clients and when the Complaint was eventually filed. At no time during that year--although Mr. Lopez has over 60 entries on his list of hours expended, and Mr. Cazares has over 20 entries on his list--was there any attempt to discover the names of the individual defendants who should be sued. Even though on January 14, 1976, Mr. Mr. (sic) Lopez made the following entry: "Research rationale and justification for John Doe practice in Ninth Circuit; alternatives in identifying unknown police officers," there

seems to have been no attempt made to identify the unknown police officers, nor was there any attempt made to determine whether those police officers sued were even at the scene or on duty at the time.

It is our contention that without any investigation on the part of Plaintiffs, Plaintiffs' claims against these particular Defendants were frivolous, unreasonable or without foundation. The Summary Judgments granted herein--holding that there was no triable issue of fact involved as to these defendants--bears this out.

DATED: January 13, 1981.

Respectfully submitted,

JONATHAN KOTLER  
PATTI ANN KOTLER  
KOTLER & KOTLER

/ss/PATTI ANN KOTLER  
Attorneys for Defendants.

## APPENDIX 14

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MARIANA R. PFAELZER  
JUDGE PRESIDING

SANTOS RIVERA, et al.,        ) No. CV 76-  
                                  ) 1803-MRP  
                  Plaintiffs,    )  
                                  )  
          vs.                    )  
                                  )  
CITY OF RIVERSIDE, et al.)  
                                  )  
                  Defendants.    )  
                                  )

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REPORTER'S TRANSCRIPT OF PROCEEDINGS  
(Partial)

PLACE: Los Angeles, California  
DATE: Tuesday, October 7, 1980

REBECCA RIMSON  
Official Reporter  
325 U.S. Court House  
312 North Spring Street  
Los Angeles, California 90012  
(213) 680-1297

APPEARANCES:

For the Plaintiffs:

CAZARES & TOSDAL; By  
ROY B. CAZARES

225 Broadway  
Suite 1352  
San Diego, California 92101

For the Defendants:

KOTLER & KOTLER; By  
JONATHAN KOTLER  
PATTI ANN KOTLER  
8500 Wilshire Boulevard  
Suite 903  
Beverly Hills, California  
90211

LOS ANGELES, CALIFORNIA, TUESDAY, OCTO-  
BER 7, 1980; 2:30 P.M.

THE COURT: All right, Mr. Flores  
is going to make a copy of the verdicts  
for you, both of you, and I will hear  
anything that you have to say and I  
will listen to anything you want to say  
about any further application for re-  
lief that you want to make to the Court  
or any motions that you want to make of  
any kind.

MR. CAZARES: At this time, your



Honor? Well--

THE COURT: You don't have to make the motion now. I am asking you is there anything further that either of you want the Court to do?

MR. CAZARES: Yes, your Honor.

THE COURT: Or any motion you want to make.

MR. CAZARES: On behalf of the plaintiffs and their counsel, we will be making a motion for attorneys fees and perhaps a motion for additur.

MR. KOTLER: Your Honor, the only thing I'd like to request to the Court at this time is that if the Court is aware of our scheduling difficulties, to the extent that we have motions, and they are set far enough into November that we could prepare an adequate response to.

THE COURT: Well, you can agree with Mr. Cazares about how we are going to deal with the attorney's fees issue. The only thing I tell you is I'm not going to set it in November. It has to be set in October.

MR. KOTLER: We're not going to be in the country.

THE COURT: You're about to leave, aren't you?

MR. KOTLER: Yes, your Honor.

THE COURT: Then we can set it as-when are you coming back?

MR. KOTLER: We'll be back around the 1st of November.

THE COURT: Then we can set it a week after you get back.

MR. KOTLER: I had in mind - - it would be on a Monday, would it?

THE COURT: No, it doesn't have to be. It can be any day you wish.

MR. KOTLER: I was going to suggest November 10, which is the first Monday.

THE COURT: Is that all right with you?

MR. CAZARES: Yes.

THE COURT: Now, the burden is on you, as you know. All you have to do is submit to the Court what your hours are.

MR. CAZARES: Yes.

THE COURT: And what you did.

MR. CAZARES: Yes.

THE COURT: The only thing I advise you is that you know, as well as I do, in the Ninth Circuit you have to give me the hours, the day you worked, and what you did.

MR. CAZARES: Yes, ma'am.

THE COURT: And if there are other people who worked - - for example, Mr. Lopez, Professor Lopez, or any other people who have worked on the case. But you've got to tell them I cannot grant attorney's fees of any kind or costs unless I have somebody give me a detailed account of what was done.

MR. CAZARES: Yes.

THE COURT: Now, it's obvious that I do not have to have a very detailed account of the days you were in trial, because you were in trial all that length of time, and I can take notice of that. But the preparation for the trial and all the time that you spent in coming here with the Riveras, and so forth, I have to have dates and hours.

MR. CAZARES: We'll prepare a proper motion, your Honor.

THE COURT: Did you come to - - and you'll also have to be aware of another thing, and that is, since I wasn't the judge on the case originally, you will have to reach back to the period of time when it was in the hands of another judge.

MR. CAZARES: Yes.

THE COURT: Now, the only thing I tell you, Mr. Kotler, is that he is going to get substantial attorney's fees, because that is a lot of time we're talking about.

MR. KOTLER: Yes, your Honor.

THE COURT: My disposition now, so that you would be aware of it, is that I would give Mr. Cazares the attorney's fees that cover everything that he did

that's legitimate so that the burden of the attorney's fees does not fall on the parties.

MR. KOTLER: Is your Honor aware that there are other judgments that were issued summarily by Judge Ferguson and still not final at this time?

THE COURT: I understand that, but I will have to reach back in those files. You will have to give me a legal ground to do it, and then you'll have to give me the time, but if you give me the basis for the time - - I'm doing this more for your benefit, Mr. Kotler, than I am for anybody else's, because I want to let you know now how I feel about attorney's fees. It is wrong to ask counsel who worked that hard and then not compensate him if there's a legal ground to do it and he

can show me. That's all.

MR. KOTLER: I'm not disagreeing.

THE COURT: And the final thing I have to say is that I have no quarrel with the quality of what he did. So if I have no quarrel with the quality and he gives me the hours, I will compensate him. And you'll have to tell me the rate.

MR. CAZARES: Yes, your Honor.

THE COURT: All right.

MR. CAZARES: Thank you.

THE COURT: Now, is there anything else?

MR. KOTLER: Have we agreed on the 10th of November?

THE COURT: Well, you take the time.

MR. CAZARES: Yes. That's fine.

THE CLERK: 9:30.

THE COURT: All right. Now, when will you put the papers in and when will you answer? That you will have to agree to.

MR. KOTLER: I can have them served by messenger on Mr. Cazares.

THE COURT: It's up to you.

MR. KOTLER: I would think by the 5th.

THE COURT: Is that all right with you?

MR. CAZARES: That's fine, your Honor.

THE COURT: All right. That's fine.

MR. CAZARES: I don't ask that he serve both counsel.

THE COURT: That's fine.

MR. CAZARES: Thank you very much, your Honor.



THE COURT: All right. Thank you, Mr. Kotler. Thank you, Mr. Cazares.

MR. CAZARES: Thank you, your Honor.

THE COURT: Here are the verdicts. You can take them if you want to and discuss them with your clients if you you'd like. Mr. Kotler's clients are not here. And then we'll both make a copy for you.

MR. CAZARES: I'll make sure the copies are made.

MR. KOTLER: Is that going to be done now?

THE COURT: It will be done now.

(Proceedings were concluded)

APPENDIX 15

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MARIANA R. PFAELZER,  
JUDGE PRESIDING

|                           |   |            |
|---------------------------|---|------------|
| SANTOS RIVERA, et al.,    | ) | No. CV 76- |
|                           | ) | 1803-MRP   |
| Plaintiffs,               | ) |            |
|                           | ) |            |
| vs.                       | ) |            |
|                           | ) |            |
| CITY OF RIVERSIDE, et al. | ) |            |
|                           | ) |            |
| Defendants                | ) |            |
|                           | ) |            |

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, October 24, 1983

BARBARA BROSNAN, CSR  
Official Reporter  
412 United States Court-  
house  
312 North Spring Street  
Los Angeles, California  
90012

LOS ANGELES, CALIFORNIA; MONDAY, OCTO-  
BER 24, 1983; 10:00 A.M.

THE CLERK: Item No. 1 on the calendar, Civil 76-1803, Santos Rivera versus City of Riverside. Counsel, please make your appearance.

MR. KOTLER: Good morning, your Honor. Jonathan Kotler for the defendant, City of Riverside.

MR. PATTERSON: Patrick Patterson for the plaintiffs.

THE COURT: All right. We have notice that today we are filing and spreading the mandate. Now the question is: would I change my mind about the attorney's fee award based on all the factors that I must take into consideration.

Now, I have read the papers and so I think I'd rather hear from Mr. Kotler.

MR. PATTERSON: Fine, your Honor.

MR. KOTLER: Your Honor, it is my

understanding under Hensley that certain findings have to be made. I don't think that there is sufficient documentation in the file to enable the Court to make those findings. That's been our position all along.

THE COURT: Which findings can't I make?

MR. KOTLER: Well, there hasn't been word one in the motions or in any of the declarations with respect to what their billing rate was. There hasn't been anything in the file with respect to what their expertise was. There's been no finding by the Court with respect to - -

THE COURT: No, you are wrong about that. About their expertise?

MR. KOTLER: Other than their own declarations.

THE COURT: Who has to say anything about it?

MR. KOTLER: It seems to me that there is a declaration by an attorney in Century City, under penalty of perjury, that says that based on these two individuals' request, the request is justified both on their hourly rate and their expertise. He never says that he knows either of them. It seems to me that the only finding with respect to the hourly rate is by this individual at Irell and Manella.

THE COURT: Now, you understand, Mr. Kotler, that the United States Supreme Court is not saying, in sending the matter back, and the Ninth Circuit is not saying, in sending the matter back, that the award is wrong or not supported. It merely wants the Court

to give it some more findings. You are now technically telling me that there is no basis for deciding that those two lawyers were expert? I watched them. Would you quarrel with their expertise?

MR. KOTLER: Certainly, I would, just based on the results obtained, which is one of the things that Hensley talked about.

THE COURT: You mean because they won - - was it 37, 37 of their claims?

MR. KOTLER: No, your Honor. They only won on three of their claims, three of the theories - - well, I have that. They only won - -

THE COURT: I know, I understand.

MR. KOTLER: Well, your Honor said 37 claims. In fact, they never pled 37 claims.

THE COURT: No, I am talking about in all -- I have forgotten the exact number, but there were a lot of verdicts in there.

MR. KOTLER: There were a lot of verdicts and there were something like seven or eight times that many verdicts for the defendants. There also was a judgment of \$33,350 on a case where the offer had been within \$8,000 --

THE COURT: When the offer had been within \$8,000?

MR. KOTLER: Prior to trial, to Mr. Cazares. I made it myself. It was a \$25,000 offer. I noticed in Mr. Patterson's paper there was talk about a \$10,000 offer, and there was years before --

THE COURT: You, in my presence, offered them \$10,000.



MR. KOTLER: I did, your Honor.

THE COURT: And that is all you offered them.

MR. KOTLER: No, your Honor, that is not correct.

THE COURT: All right. Now, Mr. Patterson, let me hear from you.

MR. PATTERSON: Well, in our view, your Honor, the only question before the Court, in light of Hensley, is whether the Court has to enter a more specific finding as to the amount of the fee being justified by the level of success. We think there is adequate material in the record to support that finding and we'd ask the Court to enter that finding and enter the judgment for the amount of the attorney's fees.

THE COURT: Let me ask you this, Mr. Patterson: Do you think I have to

make a finding on the 12 factors that are in Johnson v Georgia Highway Express?

MR. PATTERSON: No, your Honor.

I think that the Ninth Circuit in White v City of Richmond, a very recent case that was cited in our papers, --

THE COURT: Yes.

MR. PATTERSON: -- has indicated that that level of specificity is not required. The Supreme Court in Hensley as well indicated that a number of the Johnson factors were already implicated in the earlier parts of the test that the Court described in Hensley, so we don't think you have to make additional findings as to all those factors, but merely to specify why it is the Court believes that the amount of the fee is justified by the level of success that

the plaintiffs obtained in the case.

THE COURT: Say it again. Why the plaintiffs are entitled to the attorney's fees based on the level of success?

MR. PATTERSON: That is apparently the finding that the Supreme Court has required the Court to make in the Hensley case.

THE COURT: Well, let me pursue this a little further with you. You think that the Court can't make an award of attorney's fees in the amount did make if the recovery is \$33,000? Do you think I can't give anything more than the thirty-three?

MR. PATTERSON: No, certainly not, your Honor. I think that the Hensley case and the White v City of Richmond case both indicate that that is not the

test that is supposed to be applied.

THE COURT: I didn't think so.

MR. PATTERSON: I think the Court's award clearly is justified by the circumstances in this case. All the Court is required to do under Hensley is to make more explicit its reasoning in finding that that amount of fees was justified by the circumstances of this case.

The Court did that to some extent in the findings it had already entered, which were similar to the District Court's findings in the Hensley case in the Supreme Court.

THE COURT: Very similar.

MR. PATTERSON: Very similar.

THE COURT: I didn't just make the award. I did say what I thought about the case.

MR. PATTERSON: Yes, your Honor.

THE COURT: And the way it was handled. I certainly thought there was a basis for the award.

MR. PATTERSON: But the problem is the Supreme Court apparently wants a more explicit statement of the basis for the award where the plaintiffs have prevailed on fewer than all the claims that are asserted, which is the situation here. But the fact that the plaintiffs only obtained damages and not injunctive relief is not determinative, nor would it be determinative if it were vice versa. These rights are by their nature nonpecuniary.

The legislative history underlying the Section 1988 makes it clear that it is not the sole criterion; that it would discourage rather than encourage

civil rights litigation to restrict fees in that way. That, I think, is not what the Supreme Court is trying to suggest in the Hensley case and, certainly, the Ninth Circuit did not suggest it in the White case.

THE COURT: Now let me go back to you, Mr. Kotler. Are you telling me that you don't think there is in the file any declaration indicating what their hourly rate was and the number of hours they spent?

MR. KOTLER: What their hourly rate was?

THE COURT: Yes.

MR. KOTLER: Yes, your Honor.

THE COURT: There is nothing in there?

MR. KOTLER: I don't recall that there was.

THE COURT: Well, Mr. Patterson, I will have to look back because I wouldn't have made an award of attorney's fees if I didn't have the number of hours and I didn't have the hourly rate, and the Ninth Circuit wouldn't have affirmed it. And you noticed they did.

MR. KOTLER: Your Honor, my memory is my memory. I recall that they asked for attorney's fees at the rate of \$125 an hour and that is what the Court awarded. I also recall a declaration by each of them that they were fresh out of law school when the case started and I recall nothing about what they were charging at the time.

THE COURT: They were two of the best lawyers who have ever appeared in a civil rights case here in this court-

room, and they did an absolutely superb job. Everything that they submitted in writing was well done. The way Mr. Cazares handled that trial and the dignity with which those plaintiffs acquitted themselves I thought reflected admirably on him.

MR. KOTLER: Your Honor, the Court asked me if there was anything in the file with respect to what their hourly rate was and my recollection is there was not.

THE COURT: I am sure there must have been because I would not have given that award if I had not found it there.

All right. I will look back on it. I tell you now that I will not change the award. I will simply go back and be more specific about it. If for any reason Mr. Kotler is correct, and I



don't think he is, I will probably need another hearing with you.

MR. KOTLER: Will we receive notification by the clerk with respect to that additional hearing?

THE COURT: Yes, if I need it. I will look back and see what was said in the declarations. All right. Thank you.

MR. KOTLER: Thank you.

MR. PATTERSON: Thank you, your Honor.

- - -

APPENDIX 16

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or

on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party; other than the United States, a reasonable attorney's fee as part of the costs."



(2)  
No. 85-224

Supreme Court, U.S.

FILED

SEP 25 1985

JOSEPH F. SPANIOL, JR.

~~CLERK~~

In The  
**Supreme Court of the United States**  
October Term, 1985

— o —  
CITY OF RIVERSIDE, et al.,

*Petitioners,*

vs.

SANTOS RIVERA, et al.

— o —  
On Petition For Writ Of Certiorari  
To The United States Court of Appeals  
For The Ninth Circuit

— o —  
**BRIEF IN OPPOSITION**  
— o —

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## QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed a District Court's award of attorney's fees as reasonable under 42 U.S.C. § 1988 where the record contained substantial evidence that the District Court had reconsidered and redetermined the award in light of the standards established in *Hensley v. Eckerhart*.

## **PARTIES INVOLVED**

The following parties have an interest in the outcome of this case :

SANTOS RIVERA, JENNIE RIVERA, DONALD RIVERA, JEROME RIVERA, LEE ROY RIVERA, MARK LARABEE, ENRIQUE FLORES, MANUEL FLORES, JR., Plaintiffs and Respondents;

ROY B. CAZARES, GERALD P. LOPEZ, Attorneys at Law;

CITY OF RIVERSIDE, LINFORD L. RICHARDSON, MICHAEL S. WATTS, DAN PETERS, GERALD MILLER, ROBERT PLAIT, Defendants and Petitioners.



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In The  
**Supreme Court of the United States**

October Term, 1985

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CITY OF RIVERSIDE, et al.,

*Petitioners,*

vs.

SANTOS RIVERA, et al.

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**On Petition For Writ Of Certiorari  
To The United States Court of Appeals  
For The Ninth Circuit**

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**BRIEF IN OPPOSITION**

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**STATEMENT OF THE CASE**

The respondents are all Chicanos who live in or near the City of Riverside, California. In August 1975 they were all in attendance at a party given at the home of Santos, Jennie and (their son) Donald Rivera for their nephew Lee Roy Rivera. As the District Court found, "a large number of unidentified police officers of the City of Riverside without a warrant, but with tear gas and unnecessary physical force, broke up the party and arrested many of the people in attendance, including four of the [respond-

ents],” though “[t]he party was not creating a disturbance in the community at the time of the break-in.” (Petition Appendix 2 (hereinafter Pet. App.) at 2-3.) Criminal prosecutions were tenaciously pursued, but the “charges were dismissed for lack of probable cause.” (Pet. App. 2 at 2-3.) Testimony introduced by respondents at trial, which led to judgments for constitutional deprivations against both the City of Riverside and individual police officers, included evidence of seriously misstated facts in police reports that served as the basis for the alleged probable cause for the break-in, the arrests and the criminal prosecutions.

At the beginning of the case, the details of the break-in, arrests and subsequent activity of the police officers and other city officials were sketchy, confused, and almost exclusively within the knowledge of the petitioners and the other officials of the City of Riverside. Which of the tens of police officers involved did exactly what (both at the Rivera home and later) with whom and to whom was unknown and unlearnable. Under these circumstances, respondents sued thirty-two defendants, including the City of Riverside and individual police officers, alleging civil rights and pendent state tort violations.<sup>1</sup> The District

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<sup>1</sup> Petitioners incorrectly assert that respondents brought 22 claims against each and every defendant. (See, e.g., Pet. at 8.) The original complaint states seven causes of action, encompassing claims alleged on the bases of 42 U.S.C. §§ 1981, 1983, 1985 and 1986 and for false imprisonment, malicious prosecution and negligence. Only the § 1983 and state pendent claims ultimately were tried to the jury. While what is labeled in the complaint as “Seven Causes of Action” might well be interpreted to be something more than seven claims, petitioners’

Court concluded that the factual uncertainties and complexities made it "reasonable for plaintiffs initially to name thirty one individual defendants [thirty police officers and the chief of police] as well as the City of Riverside as defendants in this action." (Pet. App. 2 at 2-4.) Even through the trial itself, testimony of petitioners and other police officers was often in conflict as to the respective roles of individual police officers involved in the constitutional deprivations. (Pet. App. 2 at 2-4.)

After four years of discovery and two settlement conferences<sup>2</sup>, a nine day trial ensued on the § 1983 and state pendent claims. The jury, following seven days of deliberation, found in favor of all eight respondents and against the City of Riverside and five individual officers on § 1983, negligence, false arrest and false imprisonment claims. The jury awarded total damages of \$33,350.<sup>3</sup>

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(Continued from previous page)

grand total of 22 seems disingenuous and calculated to mislead. Petitioners do not reveal how they arrive at their final figure, but if one examines pages 6 and 7 of the petition, it appears that petitioners simply added together what they themselves have lifted from the original complaint and now describe as "claims." Included on petitioners' list of "claims" are references to a statutory choice of law and attorney's fees provision (42 U.S.C. § 1988), specific items of compensatory and punitive damages (bodily injury, property damages), and general prayers for relief.

<sup>2</sup> The District Court ordered and personally presided over both conferences. After being urged by the District Court to reconsider the substantial risk of liability at trial, petitioners' counsel made a final offer of \$10,000 on behalf of his clients—that is, a final offer of \$10,000 in satisfaction of all respondents' claims, attorney's fees and costs. (Pet. App. 2 at 2-4; 15 at 15-6 and 15-7.)

<sup>3</sup> The petitioners declare that "no restraining order issued as a result of this litigation." (Pet. at 9.) Conspicuously absent

(Continued on following page)



On December 1, 1980, respondents moved for reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988. Petitioners filed extensive written opposition, and oral argument was heard on January 19, 1981. Nearly three months later the District Court, "having heard and considered oral argument and having examined and considered the memoranda, affidavits and exhibits filed by the parties," awarded respondents \$245,456.25 in attorney's fees (\$2,112.50 of which was for law clerk fees) on the basis of written Findings of Fact and Conclusions of Law entered on April 7, 1981. (See Pet. App. 6 at 6-1—6-2.) In so doing, the District Court refused to apply the multiplier requested by respondents. Moreover, it reduced respondents' original request by those costs the District Court found to be beyond the intended scope of § 1988.

The Ninth Circuit affirmed the District Court's award as reasonable under § 1988. *Rivera v. City of Riverside*, 679 F.2d 795 (9th Cir. 1982). (See Pet. App. 1) The Ninth Circuit reviewed the record in detail and concluded that the District Court "considered, applied and discussed

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(Continued on following page)

from the petition is any report of why and under what circumstances injunctive relief did not issue. At one of several hearings on respondents' motion for attorney's fees and in the face of petitioners' efforts to reduce the fees because injunctive relief had not been granted, respondents' counsel advised the District Court that injunctive relief had not been sought at the close of trial because requesting that petitioners be enjoined to "obey the law" seemed too broad. The District Court nonetheless observed, *sua sponte*, that "if you [respondents] had asked for it against some of the officers I think I would have granted it." (See Brief in Opposition Appendix A (hereinafter Opp. App.) at A-2.) The District Court's receptiveness to a request for equitable relief is understandable in light of its written findings regarding the nature and severity of the constitutional deprivations proven at trial. (See, e.g., Pet. App. 2 at 2-5, and 2-8.)



the Kerr factors necessary to support the award." 679 F.2d at 797 (referring to *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), which adopted these guidelines from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). Rejecting petitioners' argument that all twelve factors adopted by the Ninth Circuit in *Kerr* must be mechanically invoked and discussed, the Ninth Circuit repeated that the District Court must and did consider those factors "called into question by the case at hand and necessary to support the reasonableness of the fee award." 679 F.2d at 797.

Petitioners sought a Writ of Certiorari on January 13, 1982 and respondents filed a Brief in Opposition. On May 16, 1983 this Court decided *Hensley v. Eckerhart*, 461 U.S. 424 (1983). On May 31, 1983 this Court granted petitioners' writ, and vacated and remanded the case for reconsideration in light of *Hensley*. The Court took the same action on every case on its docket related to the issues decided in *Hensley*. See, 461 U.S. 951-952 (1983)

Respondents' request for reasonable attorney's fees and costs was reconsidered by the District Court. Two hearings were held by the District Court. In preparation for the first hearing of October 24, 1983 (Pet. App. 2 at 2-1), the District Court reviewed and reconsidered all memoranda submitted with respect to the question of attorney's fees, including all memoranda submitted after the order vacating the first award and mandating reconsideration in light of *Hensley*. At this first post-remand hearing, petitioners again brought to the District Court's attention the same arguments they had raised earlier before the District Court and before the Ninth Circuit on appeal — the same factually specific arguments they now raise in the present petition. The District Court listened to these

arguments, declared its intention carefully to review the record, to request additional information if necessary and, pursuant to *Hensley's* mandate, to provide a more explicit explanation of whether the attorney's fee award was justified as reasonable. (Pet. App. 15.)

After this first hearing, the District Court spent a full six and one half months reviewing the record. (See Appendix B.) A second hearing was held on June 6, 1984 where arguments were again iterated in light of *Hensley's* standards and the thoroughly reviewed record. On July 26, 1984 the District Court issued comprehensive Findings of Fact and Conclusions of Law, awarding respondents attorney's fees in the amount of \$243,343.75 plus \$2,112.50 for fees expended for law clerks, exclusive of interest. (Pet. App. 2.) The District Court refused to apply the multiplier requested by the respondents, and further reduced the requested award by those costs the District Court found to be not contemplated by the statute.

The Ninth Circuit, finding the case suitable for decision without oral argument, affirmed the District Court's award. (Pet. App. 1 at 1-2.) After reviewing the District Court's award in light of the record, the Ninth Circuit rejected the same arguments petitioners now raise in the instant Petition. The Ninth Circuit concluded that the District Court carefully examined the record and correctly applied the *Hensley* criteria in arriving at the award and justifying the award as reasonable. (Pet. App. 1.) On August 5, 1985, the Ninth Circuit denied petitioners' motion to stay the mandate. On August 15, 1985, Justice Rehnquist temporarily stayed the mandate of the Ninth Circuit, and on August 28, 1985, Justice Rehnquist issued an in chambers opinion staying the mandate pending disposition of the petition for certiorari.

## ARGUMENT

### Reasons for Denying the Writ

#### I. Both The District Court And The Court Of Appeals Correctly Applied *Hensley* On Remand.

On May 16, 1983 this Court granted petitioners' Writ for Certiorari and remanded the present case "for further consideration in light of *Hensley*." After remand, the District Court held two additional hearings on the application of *Hensley* — on October 24, 1983 and on June 5, 1984. Before each hearing, the District Court reviewed all new memoranda filed by both petitioners and respondents, and the record that pre-existed the remand order. Indeed the District Court took a full six and one-half months between the first and second hearing to review the entire record and to reconsider the attorney's fee award in light of the *Hensley* standards. (Opp. App. B) On July 26, almost two months after the second post-remand hearing, the District Court issued comprehensive Findings of Fact and Conclusions of Law, specifically applying the *Hensley* criteria and explaining the reasons for the award clearly and precisely as required by this Court. *Hensley v. Eckhardt*, 461 U.S. 425, 437 (1983).

Finding that all claims by respondents were based on a common core of facts and involved related legal theories, the District Court concluded that respondents "achieved a level of success . . . that makes the total number of hours expended by counsel a proper basis for making the fee award." (Pet. App. 2 at 2-10.) The District Court also found that the "central and most important issue in this case was whether there was police misconduct committed by and condoned by defendants. Plaintiffs established this

misconduct to the satisfaction of the jury and the Court.” (Pet. App. 2 at 2-6.)

In response to petitioners’ contention that the amount of monetary damages alone necessarily detracts from the significance of the overall relief obtained, the District Court made a series of interrelated findings. First, the District Court explained the size of the award:

In the opinion of the Court, the size of the jury award resulted from (a) the general reluctance of jurors to make large awards against police officers, and (b) the dignified restraint which the plaintiffs exercised in describing their injuries to the jury. For example, although some of the actions of the police would clearly have been insulting and humiliating to even the most insensitive person and were, in the opinion of the Court, intentionally so, plaintiffs did not attempt to play up this aspect of the case.

(See Pet. App. 2 at 2-5—2-6.)

The District Court then made additional related findings on the nature and the degree of overall success and the relationship of this success to the reasonable hours expended:

Counsel for plaintiffs achieved excellent results for their clients, and their accomplishment in this case was outstanding . . . Defendants had engaged in lawless, unconstitutional conduct, and the litigation of plaintiffs’ case was necessary to remedy defendants’ misconduct. Indeed, the Court was shocked at some of the acts of the police officers in this case and was convinced from the testimony that these acts were motivated by a general hostility to the Chicano community in the area where the incident occurred. The amount of time expended by plaintiffs’ counsel was clearly reasonable and necessary to serve the public interest as well as the interests of plaintiffs in the vindication of their constitutional rights.

(See Pet. App. 2 at 2-7—2-9.)

These written Findings of Fact and Conclusions of Law are consistent with the District Court's statements made at the second post-remand hearing — a hearing held after months studying the complete record. For example, the District Court observed:

And I think having looked at the whole file and having looked at that case on five or six occasions that now we will have to have some findings and I want to tell you how I feel about this.

I feel that the award of fees that I gave was entirely appropriate and I went through again and looked at all of the verdicts and I have considered in depth what kind of work went into the case and I am even inclined to think that there should have been a multiplier. I didn't give a multiplier because I took into consideration the fact that not all of the people who were sued were the subject of a jury verdict. The fact that the verdicts were not extremely large is due to the restrained nature in which that case was tried and I have said that before and I repeat it now, the result in my opinion was excellent. You can hardly say that they were not successful when they had 37 jury verdicts and in each one of those jury verdict groups the City of Riverside was found responsible, was held liable and there were five police officers in the group against whom the verdicts were rendered and I am just absolutely convinced that the total accomplishment of this case was quite extraordinary.

I have tried several civil rights violation cases in which police officers have figured and in the main they [police officers] prevailed because juries do not bring in verdicts against police officers very readily nor against cities. The size of the verdicts against the individuals is not at all surprising because juries are very reluctant to bring in large verdicts against police officers who don't have resources to answer those verdicts. The relief here I think was absolutely complete. I think every one of the claims that were made were related and if you look at the common core of facts that we had here that you had total success.

(See Opp. App. B at B-4 & B-5.)



Later at that same hearing, the District Court returned to these same interrelated factors:

I think that here the time was well spent . . . The institutional behavior involved here in my opinion had to be stopped and in my opinion nothing short of having a lawsuit like this would have stopped it. It reflected a total lack of professionalism on the part of the police there and the improper motivation which appeared as a result of all this seemed to me to have pervaded a very broad segment of police officers in the department.

(See Opp. App. B at B-7.)

The Court of Appeals, in turn, reviewed whether or not the District Court had followed *Hensley* by focusing on the significance of the overall relief obtained in relation to the hours reasonably expended on the litigation. (See Pet. App. 1 at 1-7.) The Court of Appeals concluded that "this relationship is precisely what the district court focused on," and that the District Court "found a reasonable relationship between the extent of that success and the amount of the award." (See Pet. App. 1 at 1-7.) Because the District Court "clearly and precisely explained the grounds for its decision" (*Hensley*, 461 U.S. 424, 437 (1983)), the Court of Appeals concluded that the award of fees was well within the District Court's discretion. (See Pet. App. 1 at 1-10.)

In response to petitioners' argument that the fee award and the monetary damages must be strictly proportional, the Court of Appeals concluded that the legislative history of § 1988 offered no support for this position. Citing the Senate Report that accompanied the Senate bill which became The Civil Rights Attorney's Fees Awards Act of 1976, the Court of Appeals observed that an award

of attorney's fees under § 1988 should "not be reduced because the rights involved may be non-pecuniary in nature." (See Pet. App. 1 at 1-8.)<sup>4</sup> Rather, § 1988's purpose is to ensure "effective access to the judicial process." (See Pet. App. 1 at 1-8.) Thus, while the size of the damage award is relevant to the determination of the significance of the overall relief, the fee award itself need not bear a strict or mechanical proportionality to the monetary damages recovered.

In *Hensley*, this Court insisted that a "request for attorney's fees should not result in a second major litigation." 461 U.S. 437 (1983) The complaint in this case was filed in 1976 about an event that occurred in August 1975. The jury rendered verdicts for respondents and against petitioners in 1980. Reasonable attorney's fees were first awarded by the District Court in April 1981. Twice the Court of Appeals has reviewed the District Court's work and twice found it responsible and within the District Court's discretion.

Both the fee-awarding and the fee-reviewing courts have done precisely what this Court ordered on remand. In such a case, it seems precisely contrary to this Court's decision in *Hensley* to permit a transparently meritless petition for Writ of Certiorari to delay further respondents' legitimate claim to reasonable attorney's fees. Writs of Certiorari were not designed to be deployed to that end.

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<sup>4</sup> The passage from the Senate Report of which this statement is a part follows: "It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases [,] and not be reduced because the rights involved may be nonpecuniary in nature. S.Rep. No. 1011, 94th Cong. 2d Sess. 6 (1976); Accord H. R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976).

## II. The Conflict Between Circuits Asserted By Petitioners Does Not Exist.

The conflict asserted by petitioners does not exist. Indeed, it is difficult to discern precisely what conflict petitioners are attempting to describe. Petitioners cite only three cases from other circuits in the body of their argument — two First Circuit cases (*Grendel's Den, Inc., v. Larkin*, 749 F.2d 945 (1st Cir. 1984) and *Wojtkowski v. Cade*, 725 F.2d 127 (1st Cir. 1984)) and one Eleventh Circuit case (*Ramos v. Lamm*, 713 F.2d 546 (11th Cir. 1983)).<sup>5</sup> Presumably these cases represent “conflicting” views on the application of *Hensley*, though petitioners fail to identify explicitly the conflict in question. Yet a review of these three cases emphatically contradicts any claim, implicit or explicit, that conflict exists between either the First or the Eleventh Circuit and the Ninth Circuit’s application of *Hensley* in the present case.

All three Circuits view their respective opinions as entirely consistent with a straightforward application of

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<sup>5</sup> Petitioners also cite a fourth case, the Ninth Circuit’s decision in *White v. City of Richmond*, 713 F.2d 458 (9th Cir. 1983). Petitioners do not cite this recent Ninth Circuit case because it conflicts with either the First Circuit’s or the Eleventh Circuit’s decision; indeed, petitioners think *White* agrees with these two other circuits in requiring a District Court to scrutinize time records before awarding reasonable fees. (Pet. 49-51.) In the instant case, the Ninth Circuit required the District Court to scrutinize the record in a manner consistent with *White* and the mandate of both the First and Eleventh Circuits. Moreover, the Ninth Circuit responded specifically to petitioners’ claims that respondents were being compensated for hours unreasonably expended on the litigation: the Ninth Circuit expressly concluded that the District Court’s findings regarding what hours were reasonably expended were themselves supported by the record. (Pet. App. 1 at 1-6, 1-7.) It is also noteworthy that both the Ninth Circuit and the District Court rely on *White* in explaining and justifying their decisions. (See Pet. App. 1 at 1-12, n.3; 2 at 2-12 and 2-13.)



Hensley. (For example, compare *Grendel's Den*, 749 F. 2d at 950, and *Ramos*, 713 F.2d at 551-52 with Pet. App. 1 at 1-3 and 1-4.) All these cases stress the care with which a District Court must examine the record in evaluating the hours reasonably expended in light of *Hensley's* standards. (For example, compare *Grendel's Den*, 749 F.2d at 950-51 and *Ramos*, 713 F.2d 553-555 with Pet. App. 1 at 1-5; 1-6; 1-9; at 1-12, n.3.) All three underscore that a District Court must explain specifically the reasons supporting its award — most importantly addressing the explanations that Hensley outlines as most critical. (For example, compare *Grendel's Den*, 749 F.2d at 950 and *Ramos*, 713 F.2d at 552 with Pet. App. 1 at 1-5, 1-6, 1-7.) In establishing these uniform guidelines, all three Circuits retain for themselves the authority to review awards for abuses of discretion while at the same time accepting Hensley's pronouncement that district courts are uniquely suited to make fee award determinations "in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).<sup>6</sup>

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<sup>6</sup> Petitioners repeatedly insist that respondent's counsel did not exercise "billing judgment" as required by *Hensley*, and, for example, submitted hours that were not contemporaneously recorded, were duplicative and were excessive in light of the task. (See e.g., Pet. at 25, 39-42.) These fact-specific arguments were made twice before both the District Court and the Ninth Circuit, were refuted by respondents in every instance and ultimately twice rejected by the Courts as lacking merit in light of the record and Hensley's standards. To the extent that the First or Eleventh Circuit reached different conclusions about analogous assertions in the cases cited by petitioners, the conclusions reflect the difference between the records before those Circuits and the record twice before the Ninth Circuit. The distinction in outcomes regarding similar assertions made in markedly different contexts does not reveal a conflict between Circuits in the application of *Hensley*.

Perhaps as an unintended admission of the obvious absence of conflict between Circuits in the application of *Hensley*, petitioners attempt to contrive conflict by mischaracterizing what happened before the Ninth Circuit. For instance, petitioners assert that the Ninth Circuit “made no mention whatsoever of the most critical issues raised by petitioners . . .” (Pet. at 27.), which “is not to say that the Ninth Circuit specifically rejected these contentions. They simply did not deal with any of them.” (Pet. at 27.) Yet a reading of the Ninth Circuit’s opinion reveals that it carefully considered each of petitioners’ arguments and, in light of the entire record, found them lacking merit. (See e.g., Pet. App. 1 at 1-6, 1-7, 1-8, 1-9.)

Petitioners also repeatedly claim that the Ninth Circuit ignored their contention that the District Court’s work demonstrated that the District Court “[had] no intention of being bound by the decisions of the Supreme Court” (Pet. at 30), and the District Court had no “intention of even looking at the record” (Pet. at 61.) In this assertion, petitioners doubly mischaracterize the record. The Ninth Circuit specifically grounded its decision on the District Court’s careful adherence to *Hensley* and the factors relevant in explaining how the award is reasonably related to the outcome of the proceedings. (See e.g., Pet. App. 1 at 1-5 and n 2 at 1-12.) Furthermore, the Ninth Circuit expressly rejected as “meritless” petitioners’ contention that the District Court never reviewed the record. (Pet. App. 1 at 1-9.)<sup>7</sup>

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<sup>7</sup> At the first hearing after this Court’s remand, the District Court specifically noted that it had reviewed all papers submitted. (See Pet. App. 15 at 15-2.) At the second post-remand

Petitioners' position can only amount to an insistence that the Ninth Circuit's unfavorable response to their assertion of a series of specific factual arguments constitutes an application of *Hensley* in conflict with the unspecified decisions of other circuits. This position is untenable as a basis for seeking a Writ of Certiorari, and its lack of merit likely weighed in the Ninth Circuit's decision to deny petitioners' motion to stay issuance of the mandate. The Ninth Circuit responsibly reviewed the careful work of a District Court which applied *Hensley* consonant with the approaches of all other circuits in awarding attorney's fees under § 1988. This Court should not grant the petition in this case on the basis of an asserted conflict that does not exist.

**III. The Ninth Circuit Correctly Considered Monetary Damages As A Factor In The Determination Of The Relationship Between The Hours Reasonably Expended On The Litigation And The Total Success Achieved.**

**A. The Ninth Circuit's Rejection of Mechanical Proportionality Is Consistent with Hensley and the Decisions of Other Circuits.**

Petitioners' failure to articulate and document conflict between Circuits should itself be reason to deny the petition in this case. But the very generality of petitioners' framing of the Question Presented permits one to find

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(Continued from previous page)

hearing, six and one-half months later, the District Court directly alluded to its (1) having ordered the entire record from permanent storage, and (2) having reviewed the "whole file" and "having looked at the case on five or six occasions." (See Opp. App. B at 2, B-4.) The transcript of this second hearing was neither included in petitioners' appendix nor referred to in its petition.

that nearly any related issue is “raised” by the petition before this Court. Thus a substantive inadequacy in seeking a Writ of Certiorari unfortunately may be transformed into a convenient reason to graft onto this case issues not raised in the petition itself.

Among the many issues one might press as encompassed by petitioners’ vague articulation of the Question Presented is whether an award of attorney’s fees under § 1988 must bear a particular proportional relationship to the amount of monetary damages recovered. While petitioners do not raise this question and do not cite cases defining a conflict on this issue, respondents will address this question in the event it is urged *sua sponte* as an alternative basis for the granting of the Writ.

Petitioners did argue, before the District Court and the Court of Appeals, that the fee award must be strictly proportional to the damage award. On remand, both Courts specifically addressed this argument precisely in the manner outlined by *Hensley*. In those cases where — as both lower courts found in the present case — all claims are based on a common core of facts and involve related legal theories, *Hensley* directs the fee-awarding and fee-reviewing courts’ attention to the relationship between the hours reasonably expended and the significance of the overall relief obtained. *Hensley*, 461 U.S. 424, 435-436. In accordance with this directive, both the District Court and the Court of Appeals considered the size of the damage award as a relevant factor in determining the significance of the overall relief obtained, and both Courts concluded that an award of fees for all hours reasonably expended by respondents’ counsel was justified. See Argument I, *supra*.

In rejecting a mechanical test under which a § 1988 fee award must be strictly proportional to the amount of

monetary damages, the courts below simply followed the guidelines established by this Court in *Hensley*. There the Court expressly rejected any mathematical proportionality test — either between issues raised and issues prevailed upon, or between relief sought and relief obtained.<sup>8</sup> “Such a ratio,” this Court observed, “provides little aid in determining what is a reasonable fee in light of all the relevant factors.” *Hensley*, 461 U.S. at 436, n.11. Thus, “a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time.” *Id.* Just as it rejected a mechanical proportionality test, this Court also rejected that there is “precise rule or formula for making these determinations.” *Id.* at 436. In awarding fees, a district court “necessarily has discretion in making this equitable judgment.” *Id.* at 437.

In following *Hensley*’s rejection of a mechanical proportionality test, and in applying *Hensley*’s multi-factor reasonable relationship test to evaluate the work expended in light of the overall results obtained, the Ninth Circuit’s decision in the present case is consistent with the decisions of other circuits which have addressed this question. The Seventh Circuit, for example, in a case in which the district court granted \$1.00 in nominal damages along with an injunction and a declaratory judgment, held that the nominal nature of damages is a factor to be considered in determining the amount of a fee award, but it agreed with the First Circuit that a nominal damage award does not itself require an equally nominal attorney’s fee award. See *Lynch*

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<sup>8</sup> Or, as this Court also described its holding, it is not “necessarily significant that a prevailing plaintiff did not receive all the relief requested.” *Hensley*, 461 U.S. at 436, n.11.



*v. City of Milwaukee*, 747 F.2d 423, 428-429 (7th Cir. 1984); *Perez v. University of Puerto Rico*, 600 F.2d 1, 2 (1st Cir. 1979).

The Second Circuit, following *Lynch*, has also rejected a mechanical proportionality test and has held that "[a]warding attorney's fees in a manner tying that award to the amount of damages would subvert the statute's goal of opening the court to all who have meritorious civil rights claims." *DiFilippo v. Morizio*, 759 F.2d 231 (2d Cir. 1985), quoting *Lynch v. City of Milwaukee*, 747 F.2d at 429. The Second Circuit in *DiFilippo*, like the Seventh Circuit in *Lynch*, refused to adopt a mechanical standard that would either increase or reduce fees simply because a monetary damage "award viewed in some absolute terms is high or low." 759 F.2d at 235. The Second Circuit instead focused its attention, in accordance with *Hensley*, on the relationship between the fee award and the overall results obtained in the case. In part because the record revealed that the particular damage award before it was consistent with other awards in fair housing cases, the Second Circuit concluded that the plaintiffs "won an unambiguous victory . . . and their attorneys should recover a fully compensatory fee," *id.*—a determination perfectly consistent both with *Hensley* and with the Ninth Circuit's decision in the present case. (See *Hensley*, 461 U.S. at 435; Pet. App. 1 at 1-6 and 1-7).

Similarly, in *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) the Tenth Circuit rejected a mechanical proportionality approach as contradictory to *Hensley's* more contextualized focus on the relationship between work expended and overall results achieved. In *Ramos*, a case challenging the constitutionality of prison conditions, the plaintiff

class obtained declaratory and injunctive relief; it did not seek monetary damages. See *Ramos v. Lamm*, 639 F.2d 559, 562 (10th Cir. 1980)<sup>9</sup>. In light of the total success achieved, plaintiffs' attorneys were awarded \$709,933.50 in attorney's fees and \$32,782.43 in expenses allowable as costs under §1988.

Defendants challenged the fee award as an abuse of discretion. Addressing the question of proportionality, the Tenth Circuit observed:

Some courts have reduced fees when the thrust of the suit was for monetary recovery and the recovery was small compared to the fees counsel would have received if compensated at a normal rate for hours reasonably expended. We reject this practice. The amount of the monetary recovery is not as significant as the policy being vindicated. Section 1988 was designed to encourage private enforcement of the civil rights laws. Parties acting as private attorneys general should be reasonably compensated for their vindication of the public policy even if they themselves do not receive a large financial benefit. If the court has the impression that a plaintiff spent an excessive amount of lawyer time and simply overwhelmed the defendant in a case in which the litigation onslaught was unnecessary, the court should consider this factor in determining what amount of time was reasonably expended in the litigation. It should not be expressed as a requirement that the fee have a particular rela-

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<sup>9</sup> The original pro se complaint filed in November 1977 by Fidel Ramos did seek compensatory and punitive damages. The amended complaint filed by the National Prison Project and the A.C.L.U. Foundation of Colorado on behalf of Ramos and the plaintiff class in February 1978 sought only declaratory and injunctive relief and dropped the claim for compensatory and punitive damages. *Ramos v. Lamm*, 639 F.2d 559, 562 (10th Cir. 1980).

tionship to the amount of the monetary recovery.  
713 F.2d 557.<sup>10</sup>

Thus, the Tenth Circuit in *Ramos*—like the Seventh Circuit in *Lynch*, the Second Circuit in *DiFilippo* and the Ninth Circuit in the present case—has recognized that, while the amount of monetary damages is a factor to be considered in determining the reasonableness of a fee award under §1988, this single factor should not be transformed into a requirement of strict proportionality between damages and fees. Such a mechanical requirement would be contrary to *Hensley*, in which this Court expressly instructed the lower courts not to apply a “mathematical approach,” but rather to consider all relevant factors in evaluating the relationship between the hours expended and the overall results achieved. Both the District Court and the Court of Appeals followed these instructions in the present case.

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<sup>10</sup> Out of context, the first two sentences of this passage perhaps could be interpreted to reject the relevance of monetary damages to the determination of total success achieved in the *Hensley* formulation. The third sentence in the passage helps to correct any potential misinterpretation, describing the size of the monetary award as “not as significant as the policy being vindicated.” Had the Tenth Circuit meant to foreclose consideration of the size of damage awards, this third sentence far more likely would have declared that the size of such awards was “irrelevant to” or “impermissible to consider in” the determination of the total success achieved. Even if one considers the language of the first two sentences ill-chosen, however, the entire passage inescapably reveals that the Tenth Circuit, like *Hensley* and like the Ninth Circuit, was not prohibiting consideration of the size of monetary awards as a factor in the *Hensley* formulation. The Tenth Circuit was rejecting the practice of tying fee awards to damage awards rather than to the overall results as required by *Hensley*. What matters to the Tenth Circuit is the relationship between total success achieved and reasonable hours expended, not some mechanical approach to or strict proportionality between the size of damage awards and the size of fee awards.



In sum, the Ninth Circuit's rejection of a mechanical proportionality requirement does not conflict either with *Hensley* or with the decisions of other Circuits, and is not a basis upon which the Writ should be granted.

**B. The Ninth Circuit's Rejection of Mechanical Proportionality is Consistent With the Intent of Congress.**

In uniformly rejecting the proposition that a §1988 fee award must be proportional to the amount of damages, the decisions of the Ninth Circuit and other circuits are in full accord with the intent of Congress. As this Court recognized in *Hensley*, the legislative history demonstrates that the purpose of §1988 was to insure "effective access to the judicial process" in civil rights cases. 461 U.S. at 429, quoting H. R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976).

Congress was well aware that such access had not been available to persons like the respondents in the present case. In our society, those whose civil and constitutional rights are the most likely to be violated are those who typically are least able to pay the large attorney's fees and expenses that are routinely billed to more affluent citizens and businesses who wish to enforce their economic rights through the judicial process; "[b]ecause a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts." H. R. Rep. No. 1558 at 1. Moreover, Congress found that, in cases against governmental bodies and public officials such as the petitioners here, a variety of factors "preclude or severely limit the damage remedy." *Id.* at 8.

The legal system compounds these problems by translating important civil and constitutional rights into relatively small monetary amounts, thereby depriving prospective civil rights plaintiffs of the alternative route of access to the courts that conventional contingent fee arrangements generally provide to prospective personal injury plaintiffs. As Congress recognized, prior to the enactment of §1988 "private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so." *Id.* at 2. Congress enacted §1988 for the express purpose of correcting the systemic problem that had made it economically infeasible for private lawyers to accept and litigate such cases. *Id.*

Thus, although Congress acknowledged that one factor among many to be considered in determining a reasonable fee under §1988 is "the amount received in damages, if any," H. R. Rep. No. 1558 at 8.<sup>11</sup> Congress "intended that the amount of fees . . . be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases [,] and not be reduced because the rights involved may be nonpecuniary in nature." S. Rep. No. 1011, 94th Cong. 2d Sess. 6 (1976). The Ninth Circuit and other circuits have effectuated this

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<sup>11</sup> As the House Report stated: "The courts have enumerated a number of factors in determining the reasonableness of awards under similarly worded attorney's fee provisions. In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), for example, the court listed twelve factors to be considered, including the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work and the amount received in damages, if any. . . ." H. R. Rep. No. 1558 at 7.

intent by refusing to apply mechanical proportionality requirements that would once again put the judicial process beyond the economic reach of those who most need its protection.

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### CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GERALD P. LÓPEZ\*

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## **APPENDIX A**



EXCERPTS FROM REPORTER'S TRANSCRIPT  
OF PROCEEDINGS MONDAY,  
JANUARY 19, 1981:

THE COURT: \* \* \*

The question of injunctive relief actually was something I wasn't going to address before the Court and I can tell you quite simply why not. While it was clearly not a question brought to the jury, since the jury has nothing to do with granting equitable relief.

THE COURT: Nothing, no.

MR. LOPEZ: — we thought hard and long about precisely what entitlements we had for any of our plaintiffs with respect to some kind of future equitable relief.

But the bottom line of what we would ask for is virtually always denied by a court because a court properly, I think, says that for the future we will assume that all police officers will abide by the law, including the Constitution.

So that we brought nothing and have pursued nothing; indeed because we too agree with the Court that that will happen.

THE COURT: Now let me just say one thing for the record, and that is: That the plea was in there for injunctive relief. There wasn't any reason to pursue it, I suppose. But if you had asked for it against some of those officers I think I would have granted it.

MR. LOPEZ: I hope I can accept that as a proposition that says that in the event that anything happens in the future concerning those officers or our clients in the

City of Riverside, that this Court will remain available for any appropriate equitable relief.

THE COURT: I would agree with you that there is a problem about telling the officers that they have to obey the law. But if you want to know what the Court thought about some of the behavior, it was—it would have warranted an injunction. There cannot be a piece of evidence more appalling than the piece of evidence about the officer singing from the helicopter. There can't be any behavior more reprehensible than that, in my opinion.

Now I will not comment on some of the rest of it because part of the rest of the behavior at the time that this occurred was due to the fact that they didn't know what they were doing and they had nobody to tell them what they should do. There was no direction and they just simply lost their heads, totally. That is my opinion from the evidence.

I will not go on to castigate the officers, but in my opinion this was really a very sad day for that police department.

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## **APPENDIX B**



B-1

(p. 1) UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MARIANA R. PFAELZER,  
JUDGE PRESIDING

No. CV 76-1803-MRP

SANTOS RIVERA,

Plaintiff,

vs.

CITY OF RIVERSIDE,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Wednesday, June 6, 1984

BETH E. CULBERTSON, CSR  
Court Reporter Pro Tempore  
United States Courthouse  
312 North Spring Street  
Los Angeles, California 90012

(p. 2) APPEARANCES:

For the Plaintiff:

PATRICK O. PATTERSON, JR.  
Acting Professor of Law  
UCLA School of Law  
405 Hilgard Avenue  
Los Angeles, California 90024

For the Defendant:

JONATHAN KOTLER  
Kotler & Kotler  
15910 Ventura Boulevard, Suite 1010  
Encino, California 91436

Also Present:

Judge Roy B. Cazares

(p. 3)

I N D E X

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(p. 4)

LOS ANGELES, CALIFORNIA;

WEDNESDAY, JUNE 6, 1984;

3:45 P.M.

THE CLERK: Civil 76-1803, Santos Rivera versus City of Riverside. Counsel, please state your names for the record.

MR. PATTERSON: Patrick Patterson for the plaintiffs, your Honor, and also here is Judge Roy Cazares to answer any questions.

THE COURT: How are you, Judge?

MR. CAZARES: Very well, thank you. Very nice to see you, your Honor.

MR. PATTERSON: And Geráld Lopez, your Honor, is a visiting professor at Harvard Law School. He is unable to be here.

THE COURT: That is all right.

MR. KOTLER: Jonathan Kotler for the City of Riverside.

THE COURT: Now I ordered the file from where it was and I went through the whole file. As you know the question here that I had was to see how that case ap-

plied and this is a classic case of satellite litigation which we are really finding very difficult because I took this case from another judge, as you know, and in order to come to the conclusion I have come to, I had to look back through the file.

Now it is contended here that the fact that you got summary judgment granted should entitle you to legal (p. 5) fees and then nothing because you see yourself, Mr. Kotler, as representing the prevailing parties; don't you?

MR. KOTLER: Your Honor, that issue as I understood it was disposed of three years ago. We are not making any claim in the case.

THE COURT: I know that.

MR. KOTLER: We are not claiming that we are prevailing parties with respect to litigation.

THE COURT: What I am saying is that your claim, in part, is that they did not have success in this litigation which would warrant the grant of that kind of attorney's fees; is that right?

MR. KOTLER: Yes, your Honor.

THE COURT: Well, don't look so mystified. That is your position?

MR. KOTLER: I was listening to the Court, your Honor.

THE COURT: Well then, you state your position.

MR. KOTLER: I agree with the Court's statement. I was just listening to what the Court was saying.

THE COURT: I am saying to you that the reason that you come to that conclusion in part is that a long time

ago a lot of defendants were let out and in this case the defendants who remained in did not have substantial verdicts against them; is that right?

(p. 6) MR. KOTLER: I think what we are claiming, your Honor, is that to the extent that time was put in on those defendants who were eventually let out of the case either by summary judgment or otherwise, that the plaintiffs can't be seen to be prevailing parties with respect to those people.

THE COURT: I know. I know. That is just exactly why I mentioned the motion for summary judgment. That figures in the decision; doesn't it?

MR. KOTLER: Yes, your Honor, but there are other defendants as well that were subsequently dismissed.

THE COURT: I know.

MR. KOTLER: Yes.

THE COURT: And I think having looked at the whole file and having looked at that case on five or six occasions that now we will have to have some findings and I want to tell you how I feel about this.

I feel that the award of fees that I gave was entirely appropriate and I went through again and looked at all of the verdicts and I have considered in depth what kind of work went into the case and I am even inclined to think that there should have been a multiplier. I didn't give a multiplier because I took into consideration the fact that not all of the people who were sued were the subject of a jury verdict. The fact that the verdicts were not (p. 7) extremely large is due to the restrained nature in which that case was tried and I have said that before and I re-

peat it now, the result in my opinion was excellent. You can hardly say that they were not successful when they had 37 jury verdicts and in each one of those jury verdict groups the City of Riverside was found responsible, was held liable and there were five police officers in the group against whom the verdicts were rendered and I am just absolutely convinced that the total accomplishment of this case was quite extraordinary.

I have tried several civil rights violation cases in which police officers have figured and in the main they prevailed because juries do not bring in verdicts against police officers very readily nor against cities. The size of the verdicts against the individuals is not at all surprising because juries are very reluctant to bring in large verdicts against police officers who don't have the resources to answer those verdicts. The relief here I think was absolutely complete. I think every one of the claims that were made were related and if you look at the common core of facts that we had here that you had total success. That is the way I see it. There was a problem about who was responsible for what and that problem was there all the way through to the time that we concluded the case. Some of the officers couldn't agree about who did what and it is (p. 8) not at all surprising that it would, in my opinion, have been wrong for you not to join all those officers since you yourself did not know precisely who were the officers that were responsible.

Now the fact they were let our later may or may not have been a correct ruling on the part of Judge Ferguson. I have great admiration of him. He is an absolutely su-



perb judge but we all grant summary judgments knowing that they are often reversed in the appellate court. I don't purport I could do so, but having looked at the file, I am not passing judgment on the people who were let out of the case. I am just saying that it seems to me there was total success here.

Now I have touched on the fact that it was never actually clear what officer did what until we had gotten through with the whole trial.

I have mentioned to you that I did not think—and I told you this before—I did not think that the plaintiffs exaggerated their injuries. They had great dignity I thought when they testified and on that basis and the basis that juries I think are reluctant to bankrupt police officers—and well they ought to be—I think that it is totally understandable what the size of the verdicts were but there were 37 of them and let's not forget that.

(p. 9) If you remember there were seven for Jerome Rivera and there were four for Santos Rivera, four for Larabee, four for the boy Daniel, Jennie Rivera got four; Lee-Roy Rivera had three, Enrique Flores had five and Manuel Flores had six.

I can never be brought to see that as a case in which you did not totally prevail. You had great success.

I also think it was very difficult to go through the issues in that case.

It took two of my clerks one whole week to just sort out the jury instructions which I gave them with notes and comments that I myself made.



I know you would have had a very difficult time if you had been any of those plaintiffs finding somebody to take the case. I know that. I am well aware of how reluctant people are. I am asked to get counsel for cases all the time. I can't find counsel for them and I think that here the time was well spent and I want to pause just for a minute because I want you to do a set of findings—proposed findings.

The institutional behavior involved here in my opinion had to be stopped and in my opinion nothing short of having a lawsuit like this would have stopped it. It reflected a total lack of professionalism on the part of the police there and the improper motivation which appeared as a (p. 10) result of all of this seemed to me to have pervaded a very broad segment of police officers in the department.

I tried on several occasions to settle this case. I was unable to do so.

I am aware that we had an exchange about the settlement offer before, but I remember bringing the whole family here. I tried my best to get somebody to listen about an adequate offer. No adequate offer was ever suggested. You know, I understand one later on occurred but that was well after you had spent thousands of dollars on preparation for trial, I am sure.

JUDGE CAZARES: Just on that point, if I may—

THE COURT: Yes.

JUDGE CAZARES: —I was surprised when I read that because I don't recall any offer being made prior to trial in that amount and then I recall leaving the court-

room after the jury began their deliberations and he made an offer in the corridor but that was after the trial was concluded.

THE COURT: Well, let me tell you that my memory of this meeting with this family—although I must say I see so many people I sometimes forget—but I will never forget that occurrence and it seems to me that the expenditure of funds here became absolutely necessary. There was not any possible way that you could have avoided (p. 11) putting in that amount of time and finally I say to you that I really believe that if you were in another courtroom and you were talking to another judge, you would be perfectly justified in asking for a multiplier. I looked at those services. I looked at the file. It seems to me that we are not just talking about anything except a successful lawsuit in which the jury very properly balanced the interests of the City of Riverside and the police department and came out with the size verdicts that it did.

Mr. Kotler, I will never believe that under Hensley this is not an appropriate award. I tell you that with respect to taking out some of the police officers, I think if you had a difference of opinion about some of them who were let out so now I will tell you I am not going to change my mind. I am going to let the award stand but I do want to have Mr. Patterson prepare, based on what I have said today, a set of findings that will finally put an end to all of this under Hensley.

Now I tell you you can say to yourself, Judge Cazares, that you did a very good job and you can say that with respect to Mr. Lopez as well. I do not intend to change my mind. Now you submit the finding to me and I will

go over them and if they are in conformity with — I ordered the original file. I am keeping it until I get (p 12) the findings.

When will you do that?

MR. PATTERSON: Well, your Honor, I would like to have a copy of the transcript, of the Court's comments today.

THE COURT: You won't be too long doing that?

THE REPORTER: One week.

THE COURT: Now you notice when you get this transcript I have not come out with something that was canned. I did not come out here to read from something. I was, when I went through this, just looking at my notes.

I feel very strongly about this case and I feel very strongly about all litigation involving police officers. They have a very hard job to do and I do not want them to be penalized in any way nor the City of Riverside and that is why you didn't get the multiplier, but I certainly think one was warranted. You had absolutely total success.

Now you take the transcript and you may use that as a guide but the findings will be in a position so that the appellate court can look at them and see if I have adequately analyzed what is going on here.

MR. PATTERSON: Yes, I understand that, your Honor. I will attempt to do it. I would not need more than two weeks after getting the transcript.

THE COURT: All right. The transcript will be (p 13) ready in one week. It will be three weeks then.

MR. KOTLER: Your Honor, will we have time to respond to the proposed findings?

THE COURT: No, because I will tell you what I will do. I will set a hearing date for you to come in and do it orally. I do not intend to have — you know, that is probably not fair to you, but you see, I have kept them from having this so far for months and months and months. Now it took me a month to get this out of storage and they couldn't find the verdicts. Now we are going to bring an end to this.

All right. You have as long as you want. You tell me how much time you want.

MR. KOTLER: Two weeks after I receive the transcript.

THE COURT: You set the date by stipulation.

MR. PATTERSON: We can do that, your Honor.

THE COURT: And then you will give me an order and I will sign that and that will give me some guidance as to what you want to do. If you want to come in and discuss it, put that in the order, too, and that will be on Monday afternoon.

MR. KOTLER: One more matter. As I understand the Court's ruling, the Court is going to make an order awarding the exact same amount of fees that were ordered previously?

(p 14) THE COURT: Yes.

MR. KOTLER: We have kept our appeal bond on file. It is still good and in perfect order. If it becomes necessary to take a further appeal of this matter rather

than come back into court and post another bond, may I stipulate that we keep the same bond on file?

THE COURT: Put that in the order, too.

MR. KOTLER: All right.

THE COURT: That is fine.

I want to note something. I think this is terribly unfair to keep going up and down through the appellate court. I really think it is very unfair but it is your right to do it. If I were a city and I had all the money I needed to finance this to take place I guess I would maybe do that. I can't believe that the City of Riverside after what happened with the facts in this case would not try to get this worked out, but if what you want is litigation, by golly, that is what we are going to have.

MR. KOTLER: For the record, your Honor, the City of Riverside hasn't paid a penny other than the deductible and that was years ago.

THE COURT: I am very dismayed about this. I think any fair appellate court that I looked at the facts of this case would be appalled just as I was appalled and I have not had one other case in my courtroom in which I felt (p 15) that deeply about what took place. This was, in my opinion, totally wrong behavior for which there is absolutely no excuse whatsoever. I have never had a set of facts I felt more deeply about and I did not know at the time of the settlement conference just how reprehensible the behavior of some of those police officers was and I am sorry that I had to find out. That's it.

MR. PATTERSON: Your Honor, just in response to the possibility of another appeal, I wanted to advise the Court that if that does occur we will be coming back into court for a request for fees.

THE COURT: Do whatever you want to about that. I just feel this is so terribly unfair, the whole thing. I think it was, first of all, a bad set of facts, and I think it is getting worse, so that is my opinion and I have expressed it.

MR. KOTLER: Thank you.

MR. PATTERSON: Thank you, your Honor.

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Beth E. Culbertson  
Official Reporter

6-12-84  
Date



(3)  
No. 85-224

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1985

Supreme Court, U.S.  
FILED  
OCT 15 1985

JOSEPH F. SPANIOLO  
CLERK

CITY OF RIVERSIDE, LINFORD L.  
RICHARDSON, MICHAEL S. WATTS,  
DAN PETERS, GERALD MILLER, and  
ROBERT PLAIT,

Petitioners,

vs.

SANTOS RIVERA, JENNIE RIVERA,  
DONALD RIVERA, JEROME RIVERA,  
LEE ROY RIVERA, MARK LARABEE,  
ENRIQUE FLORES, and MANUAL  
FLORES, JR.,

Respondents.

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PETITIONERS' REPLY TO BRIEF  
IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI

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Attorneys for Petitioners

EST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW:

What are the proper standards within which a district court may exercise its discretion in awarding attorney's fees under Section 1988 of Title 42 of the United States Code.



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No. 85-224

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1985

CITY OF RIVERSIDE, LINFORD L.  
RICHARDSON, MICHAEL S. WATTS,  
DAN PETERS, GERALD MILLER, and  
ROBERT PLAIT,

Petitioners,

vs.

SANTOS RIVERA, JENNIE RIVERA,  
DONALD RIVERA, JEROME RIVERA,  
LEE ROY RIVERA, MARK LARABEE,  
ENRIQUE FLORES, AND MANUAL  
FLORES, JR.,

Respondents.

---

On Petition for Writ of Certiorari  
To the United States Court of Appeals  
For the Ninth Circuit

---

PETITIONERS' REPLY TO BRIEF  
IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI

## ARGUMENT

I. An award of attorneys fees more than seven times the amount of a judgment which awarded monetary relief only is not "a reasonable attorney's fee" as defined by 42 USC §1988

In seeking review of an attorneys fee award in the sum of \$245,456.25, following a jury award of \$33,350.00 in damages to eight plaintiffs against six of the 32 defendants against whom they had brought suit, Petitioners herein never argued merely for strict adherence to the doctrine of "mechanical proportionality" as Respondents claim throughout their Brief In Opposition (hereafter, "RBO"). Rather, what Petitioners have sought, and what the Ninth Circuit, the District Court, and Respondents have pointedly ignored, is that the concept of "reasonableness" as explained by this Court when it decided to make use of the phrase "billing judgment"

in the case of Hensley v. Eckerhart,  
461 U.S. 424, 103 S.Ct. 1933 (1983), be  
applied to the facts of this case. As  
this Court stated therein:

"The district court should  
exclude from this initial fee  
calculation hours that were  
not "reasonably expended."  
(citations) Counsel for the  
prevailing party should make  
a good faith effort to ex-  
clude from a fee request  
hours that are excessive, re-  
dundant, or otherwise un-  
necessary, just as a lawyer  
in private practice ethically  
is obliged to exclude such  
hours from his fee submission.  
"In the private sector 'bill-  
ing judgment' is an important  
component in fee setting. It  
is no less important here.  
Hours that are not properly  
billed to one's client are  
not properly billed to one's  
adversary pursuant to statu-  
tory authority."

Hensley v. Eckerhart, supra,  
461 U.S. at 434, 103 S.Ct.  
at 1939-1940, quoting from  
Copeland v. Marshall, 641  
F.2d 880, 891 (D.C. Cir.

(1980) emphasis in  
the original

As stated in Petitioners' Petition for Certiorari (hereafter, "PPC"), appellate courts other than the Ninth, seem to have agreed on the necessity of bringing to bear realistic "billing judgment" in order to arrive at a "reasonable" attorneys fee under 42 USC §1988. On the other hand, the instant case is a textbook example of what can happen when the exercise of "billing judgment" required by this Court in Hensley, supra, is not applied to the facts at hand. Herein, nearly a quarter of a million dollars in attorneys fees were awarded by the trial court after jury verdicts yielding not quite one-seventh that amount, and no other relief.

Respondents' vacuous protestations notwithstanding, there is nothing in the

legislative history of section 1988 which could possibly lead to the conclusion that Congress ever intended such a result. Indeed, section 1988 provides for the award of "a reasonable attorney's fee", not an absurdly large one. (PPC, Appendix 16) An award seven times the amount of a jury verdict, on its face, therefore, is hardly one which could be deemed "reasonable."

As Mr. Justice Rehnquist noted less than two months ago when he took the extraordinary action of reversing the Ninth Circuit's refusal to stay issuance of its mandate herein:

"I think the award of attorney's fees in this case, representing more than seven times the amount of the monetary judgment obtained, is so disproportionately large that it could hardly be described as "reasonable."

(On Application for Stay,



No. A-122, August 28, 1985, pp. 4-5; the full text of Justice Rehnquist's Order Granting Stay is attached hereto as Appendix 1; the above quote appears at pp. 10-11)

Noting that neither Hensley, supra, nor Blum v. Stenson, (104 S.Ct. 1541 (1984), "addressed whether disproportionality between the amount of the money judgment obtained and the amount of the attorney's fee, standing alone, is a consideration that might properly lead a court to reduce the fee" (Appendix 1 hereto, pp. 14-15), Mr. Justice Rehnquist concluded that:

"[i]n this case and in City of McKeesport [No. 84-1793] there are only monetary judgments, and it is difficult for me to believe that Congress intended by §1988 to authorize a prevailing plaintiff to obtain more generous court-ordered attorney's fees from a defendant than the plaintiff's attorney might

himself have fairly charged to the plaintiff in the absence of a fee-shifting statute. The billing experience I gained in 16 years of private practice strongly suggests to me that a very reasonable client might seriously question an attorney's bill of \$245,000 for services which had resulted solely in a monetary award of less than \$34,000. In this sense nearly all fees are to a certain extent "contingent," because the time billed for a lawsuit must bear a reasonable relationship not only to the difficulty of the issues involved but to the amount to be gained or lost by the client in the event of success or failure. Nothing in the language of §1988 or in the legislative history set forth above satisfies me that Congress intended to dispense with this element of billing judgment when a court fixes attorney's fees pursuant to the statute."

(On Application for Stay,  
Appendix 1 hereto, pages  
15-17)

II. Demeaning Petitioners' arguments as "fact-specific" in no way lessens their importance; nor does it explain the failure of both the District Court and the Ninth Circuit to address them

Taking their lead from the conduct of both the District Court and the Ninth Circuit, from whose decisions review is currently being sought herein, Respondents have spent a good deal of their allotted time in their Brief in Opposition in not addressing many of the issues raised by Petitioners at all stages of the fee award and review process.

Indeed, rather than attempting to refute Petitioners' arguments, Respondents disdainfully scorn them as merely being "fact-specific" (RBO, p. 13, fn. 6), apparently in an attempt to lessen their importance in the eyes of this Honorable Court, and, hence, to render

them less worthy of review. Oddly, the term "fact-specific" is unexplained by Respondents, although it is urged that such a term can have only one meaning: based upon facts, or, in this case, based upon the record.

These "fact-specific" arguments, not treated by Respondents in their Brief in Opposition (nor below), nor by the trial court in making its fee award, nor by the Ninth Circuit if affirming same, include the non-reduction of Respondents' fees on account of: (1) their lack of contemporaneously kept time records; (2) time records showing duplicative services; (3) time records reflecting travel time only; (4) time records reflecting prelitigation time; and (5) time records reflecting post-litigation time.

Additional "fact-specific" argu-

ments raised by Petitioners include the fact that several items specifically set forth as items to be considered before making fee awards pursuant to 42 USC §1988 in the decisions in both Johnson v. Georgia Highway Express, 488 F.2d 714, 719 (5th Cir. 1974) and Kerr v. Screen Extras Guild, 526 F.2d 67 (9th Cir. 1975), were pointedly ignored by both the Ninth Circuit and the District Court herein (PPC, pp. 20-25).

Not surprisingly, the most prominent among these ignored Johnson/Kerr factors was fee awards in similar cases.

An extremely critical "fact-specific" argument made by Petitioners to the Ninth Circuit, and by ignored by it; and made by Petitioners in their Peti-

tion for Certiorari herein and ignored by Respondents in their Opposition Brief is the matter of the District Court's stated intention, from at all times after the jury verdicts were read, to ignore the law regarding the standards for the award of attorneys fees, and, instead, to do for Respondents by way of an award of attorneys fees what the jury had refused to do by way of judgment. (PPC, Appendix 14, and PPC, pp. 30-34)

Likewise was the ignoring by Respondents in their Brief in Opposition (and by the Ninth Circuit as well) of Petitioners' "fact-specific" arguments regarding the trial court's announced predisposition to reinstate the entire fee award, even after reversal and remand for reconsideration in light of Hensley, supra. As pointed out in the Petition for Certiorari (PPC, pp.34-

37; PPC, Appendix 15), this announced intention of the trial court was made prior to its review of any files and records subsequent to remand. And yet, Respondents continue to refuse to deal with a "fact-specific" issue which in and of itself must be seen as an abuse of the trial court's discretion.

Indeed, none of the above recited "fact-specific" arguments raised by Petitioners to the Ninth Circuit were ever addressed by the same Ninth Circuit panel which previously had affirmed the exact same award of attorneys fees herein. (PPC, Appendices 2, 5) If, as Respondents claim in their Opposition Brief, "these fact-specific arguments . . . were twice rejected by the Courts as lacking merit in light of the record and Hensley's standards" (RBO, p. 13, fn. 6), then these arguments



were rejected only by the Ninth Circuit's and the trial court's refusal to address any of them, absent sweeping statements that everything was done properly.

In conclusion, one "fact-specific" argument which Petitioners herein have continued to raise is that the record in this matter, other than the Ninth Circuit's affirming of the trial court's decision to award attorneys fees in excess of 700% of the amount of the jury award, is utterly silent as to those things which Respondents have chosen to demean as "fact-specific," and which other courts, including this one, have termed necessary guidelines which must be considered before a proper award of attorneys fees may be made under 42 USC §1988.



III. The decision to grant certiorari must be based on the law and the facts as represented by the state of the record herein

The purported "Statement of the Case" as set forth in Respondents' Brief differs from Petitioners' counterpart both in terms of what is specifically related therein, as well as by what is inferred by the judicious turn of a phrase, here and there, by counsel for Respondents.

However, when comparing the two "Statements," it is critical to keep in mind that Petitioners' "Statement" is based entirely on readily verifiable court records attached as appendices to the Petition, while Respondents' "Statement" is based largely either (1) on documents which they themselves prepared, or (2) on "facts" for which there is no verification in the record.

An example of the former is the trial court's Findings of Fact and Conclusions of Law (PPC, Appendix 2), which the trial court ordered Respondents to prepare (RBO, Appendix B, p. 8).

An example of the latter includes references (RBO, p. 3, fn.3) to a final offer of settlement in the amount of \$10,000.00, when, in fact, the actual offer was \$25,000.00 and that sum didn't even include the issue of attorneys fees and costs since it was rejected out of hand by Respondents' counsel. (Even though it turned out to be within \$8,350.00 of the ultimate jury award) Of course, there is nothing in the record to prove what the true facts were in this regard. They are unverifiable.

Further, Respondents try to confuse the issue of the degree of success

which they achieved by backing away from the language of their own complaint with respect to the number of claims involved herein (RBO, pp. 2-3, fn. 1). But regardless of the mathematics used, some verifiable facts remain clear: Eight plaintiffs sued 32 defendants. They prevailed as against only six of these defendants. The remaining 26, including the chief of police (Fred Ferguson) were found to have no liability to plaintiffs. No policies of the City of Riverside or its police department were changed, or even sought to be changed by the Respondents, who pursued the trial of this matter strictly as one for money damages only.

Then, in an attempt to show how much consideration the District Court gave the issue of attorneys fees following remand herein, Respondents state

that the District Court "spent a full six and one half months reviewing the record." (RBO, p. 6) This is untrue, as the record is clear that while six and one half months elapsed between the two "hearings" held by the trial court subsequent to remand, during much of this time, the file was unavailable in storage, while during an unspecified remainder, the trial court just didn't get to it. (RBO, Appendix B, p. 10)

But Respondents' use of innuendo and inference where facts are called for is not limited to the section of their Brief labeled "Statement of the Case." Indeed, in a blatant attempt to cause the belief that their clients are among society's downtrodden, Respondents' attorneys state:

"Congress was well aware such access had not been available to persons like

the respondents in  
the present case."

(RBO, p. 21; emphasis  
added)

As an attempt to engender sympathy, the underlined phrase is effective; but it is entirely a fiction. Respondents were all middle class. The Rivera home, where the incident took place, was a modern, detached, single family residence. None of the Respondents even remotely could be considered to be among the "have nots" of society. More importantly, none of the above facts--like Respondents' above cited inference--can be discerned from the record.

And that is precisely the point. Petitioners have always been more than willing to rely upon the record herein for vindication of their cause. Respondents, the trial court, and the Ninth Circuit, apparently were not and

are not.

For the reason why this remains so one need look no further than the results below from which review is sought: an award of attorneys fees seven times the amount of a jury verdict, in a case in which the individual plaintiffs proceeded only in an attempt to get money damages, where no governmental policies were changed as a result, and in which the lion's share of the defendants (26 out of 32) were found to have no liability to any of the plaintiffs for any reason whatsoever.

Respondents have stated that Petitioners' attempt to gain review of this result is "transparently meritless"

(RBO, p. 11) But once the record herein is studied, once it is ascertained how the intent of Congress in enacting section 1988 has been perverted by such

a result, and once it is apparent that this same type of mischief is occurring elsewhere (e.g., Cunningham v. City of McKeesport, supra), the conclusions as to the merits of the instant Petition for Certiorari must be the same as those reached in August by Mr. Justice Rehnquist, who, after reviewing the record herein, stated:

"I also think, for the reasons stated, that the probability of applicants' succeeding on the merits is substantial."

(On Application For Stay, Appendix 1 hereto, p. 10)

Wherefore, Petitioners respectfully pray that a writ of certiorari be granted.

KOTLER & KOTLER

BY: JONATHAN KOTLER

Attorneys for Petitioners



## APPENDIX 1



SUPREME COURT OF THE UNITED STATES

No. A-122

CITY OF RIVERSIDE, et al. v. SANTOS  
RIVERA, et al.

ON APPLICATION FOR STAY

[August 28, 1985]

JUSTICE REHNQUIST, Circuit Justice.

Applicants, the City of Riverside and five of its current or former police officers, ask that I stay pending disposition of their petition for certiorari the mandate of the Court of Appeals for the Ninth Circuit requiring applicants to pay respondents \$245,456.25 in attorney's fees. The attorney's fees were awarded by the District Court pursuant to 42 U.S.C. §1988, following a trial in which respondents recovered from applicants a total of \$33,350 in damages. This case seems to me to present a significant question involving

the construction of §1988: should a court, in determining the amount of "a reasonable attorney's fee" under the statute, consider the amount of monetary damages recovered in the underlying action? On August 15, 1985, I temporarily stayed the Ninth Circuit's mandate in order to permit further study of the stay application, the response thereto, and the petition for certiorari. Having fully considered the parties' submissions, I now grant the requested stay.

On August 1, 1975, respondents were attending a large private party in the Latino section of Riverside when numerous police officers entered, forcibly broke up the party, and arrested many of the guests, including four of the respondents. The four respondents who were arrested were later prosecuted,

but the charges were dismissed for lack of probable cause. Respondents, in turn, filed suit against the City of Riverside, its chief of police, and thirty police officers, alleging violations of the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, violations of 42 U.S.C. §§1981, 1983, 1985(3), and 1986, and pendent state claims for conspiracy, emotional distress, assault and battery, bodily injury, property damage, breaking and entering a residence, malicious prosecution, defamation, false arrest and imprisonment, and negligence. Respondents sought compensatory and punitive damages, injunctive and declaratory relief, and attorney's fees.

Prior to trial, respondents dropped their requests for injunctive

and declaratory relief, along with their original allegation that the police officers had acted with discriminatory intent. Also prior to trial, seventeen of the individual defendants were dismissed on motions for summary judgment. After a nine-day trial, the jury returned a verdict exonerating another nine of the individual defendants from liability, and awarding \$33,350 to respondents based on eleven violations of §1983, four instances of false arrest and imprisonment, and twenty-two instances of common negligence. Respondents did not prevail on any of their remaining theories of liability, no restraining orders or injunctions were ever issued against any of the defendants, and the City of Riverside was not compelled to, and did not, change any of its practices

or policies as a result of the suit.

Respondents filed a post-trial motion for attorney's fees pursuant to §1988. Following the submission of affidavits documenting the hours spent on the case by counsel for respondents, the District Court awarded respondents \$245,456.25 in attorney's fees. Applicants appealed the award, and the Court of Appeals affirmed. Rivera v. City of Riverside, 679 F.2d 795 (CA9 1982). We granted certiorari, vacated the judgment, and remanded the case for further consideration in light of our then-recent decision in Hensley v. Eckerhart, 461 U.S. 424 (1983). City of Riverside v. Rivera, 461 U.S. 952 (1983). On remand, and after a brief hearing, the District Court again awarded respondents \$245,456.25 in attorney's fees, and the Court of Appeals again affirmed,

this time in an unpublished opinion. The Court of Appeals also denied applicants' motion for a stay pending the disposition by this Court of a petition for certiorari.

At each stage of the proceedings in this case, applicants have challenged the attorney's fee award on the ground that it is disproportionately large in comparison to the amount of the monetary judgment recovered. In the District Court, in opposition to respondents' initial request for nearly \$500,000 in attorney's fees, applicants cited Scott v. Bradley, 455 F.Supp. 672 (ED Va. 1978), for the contention that "there is no reason to provide an economic windfall to plaintiffs' counsel by awarding them 16 times the award received by plaintiffs in the instant action." App. to Pet. for Cert. at

10-21. The opinion of the Court of Appeals on the first appeal states that "[a]ppellants urge this court to reduce the amount awarded . . . because the attorney's fees were disproportionately larger than the jury verdict." Rivera v. City of Riverside, 679 F.2d 795, 797 (CA 9 1982). The Court of Appeals rejected the disproportionality argument, however, holding that "[t]he extent to which a plaintiff has 'prevailed' is not necessarily reflected in the amount of the jury verdict." Id., at 798. Applicants in their petition for certiorari to this Court have framed the more general question of "the proper standards within which a district court may exercise its discretion in awarding attorney's fees to prevailing parties under §1988," but although such a formulation is not a model of specificity,



it does "fairly subsume," inter alia, the disproportionality issue.

There is also presently pending before this Court a petition for certiorari in the case of City of McKeesport v. Cunningham, No. 84-1793, which raises the same issue as to disproportionality between the amount of a money judgment recovered and the size of the attorney's fee award under §1988. In that case the District Court entered judgment for the plaintiff in the amount of ~~\$17,000~~ as damages for the taking of property without due process of law, and plaintiff then moved for an award of some \$35,000 in attorney's fees and costs based on time spent on the case. The District Court, after review of the relevant materials, reduced the amount of the requested award because, among other things, the plaintiff's lawsuit



created no new law and was unlikely to benefit anyone but the plaintiff. On appeal, the Court of Appeals for the Third Circuit reversed, holding that the District Court was wrong in applying what the Court of Appeals characterized as a "negative multiplier" based on the low value of the lawsuit to the general public. Cunningham v. City of McKeesport, 753 F.2d 262, 268-269 (CA3 1985). The Court of Appeals directed that the plaintiffs recover the full amount of attorney's fees claimed.

In my view, the question of the proportionality of \$1988 attorney's fees to the amount of the monetary judgment awarded, a question which seems to me to be presented by each of these cases, is likely to command the votes of four members of the Court to grant certiorari in one of the cases

and to postpone consideration of the certiorari petition in the other pending plenary review of the first. I also think, for the reasons hereafter stated, that the probability of applicants' succeeding on the merits is substantial. As we have previously acknowledged, §1988 was enacted "to ensure 'effective access to the judicial process' for persons with civil rights grievances." Hensley, supra, at 429 (quoting H.R. Rep. No. 94-1558, p. 1 (1976)). At the same time, the statute authorizes only the award of "reasonable" attorney's fees, reflecting Congress's intent that such fees be "adequate to attract competent counsel," yet not so large as to "produce windfalls to attorneys." S. Rep. No. 94-1011, p. 6 (1976); see also H.R. Rep. No. 94-1558, p. 9 (1976). I think the award of attorney's fees in

this case, representing more than seven times the amount of the monetary judgment obtained, is so disproportionately large that it could hardly be described as "reasonable."

The question of what is a "reasonable" attorney's fee involves substantial elements of judgment and discretion in the District Court, but Congress has provided the courts with some guidelines for the exercise of this judgment and discretion. The Senate and House Reports accompanying §1988 refer the courts to the twelve factors identified in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (CA5 1974). Those factors include "the amount involved and the results obtained." Hensley, supra, at 430 n. 3. Perhaps more important, the House Committee on the Judiciary, in citing Johnson, chose to

highlight the following five factors:

"the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work, and the amount received in damages, if any." H.R. Rep. No. 94-1558, p. 8 (1976) (emphasis supplied).

Despite this seemingly clear statement of legislative intent, however, other Courts of Appeals in addition to the Ninth Circuit have held not only that the amount of damages received is not a mandatory consideration in awarding attorney's fees under §1988, but that it is not even a permissible one. For example, in DiFilippo v. Morizio, 759 F.2d 231 (CA2 1985), the Second Circuit held: "We believe a reduction made on the grounds of a low award to be error unless the size of the award

is the result of the quality of representation." Id., at 235. Similarly, in Ramos v. Lamm, 713 F.2d 546 (CA10 1983), the Tenth Circuit stated: "Some courts have reduced fees when the thrust of the suit was for monetary recovery and the recovery was small compared to the fees counsel would have received if compensated at a normal rate for hours reasonably expended. We reject this practice." Id., at 557. Other courts, including the Seventh Circuit, have taken the opposite view. See, e.g., Bonner v. Coughlin, 657 F.2d 931, 934 (CA7 1981) ("[T]he nominal nature of the damages is a factor to be considered in determining the amount of the award. . . . The amount recovered may sometimes indicate the reasonableness of the time spent to vindicate the right violated."); Scott v. Bradley, 455 F.Supp. 672, 675

(ED Va. 1978).

This Court has already recognized that "[t]he product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" Hensley, supra, at 434. Similarly, in Blum v. Stenson, \_\_\_ U.S. \_\_\_, 104 S.Ct. 1541 (1984), we explained that "there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high." Id., at \_\_\_, 104 S.Ct. at 1548. Neither Hensley nor Blum, however, addressed whether disproportionality between the amount of the monetary judgment obtained and the

amount of the attorney's fee, standing alone, is a consideration that might properly lead a court to reduce the fee.

This is not to suggest that substantial attorney's fees cannot be awarded in cases involving primarily injunctive or other nonpecuniary relief, see S. Rep. No. 94-1011, p. 6 (1976) ("It is intended that the amount of fees . . . not be reduced because the rights involved may be nonpecuniary in nature."); H.R. Rep. No. 94-1558, p. 9 (1976). Nor would an unusually large attorney's fee necessarily be inappropriate where a defendant's bad-faith conduct requires plaintiff's counsel to spend an inordinate amount of time on a case. But in this case and in City of McKeesport, there are only monetary judgments, and it is difficult for me to believe that Congress intended by

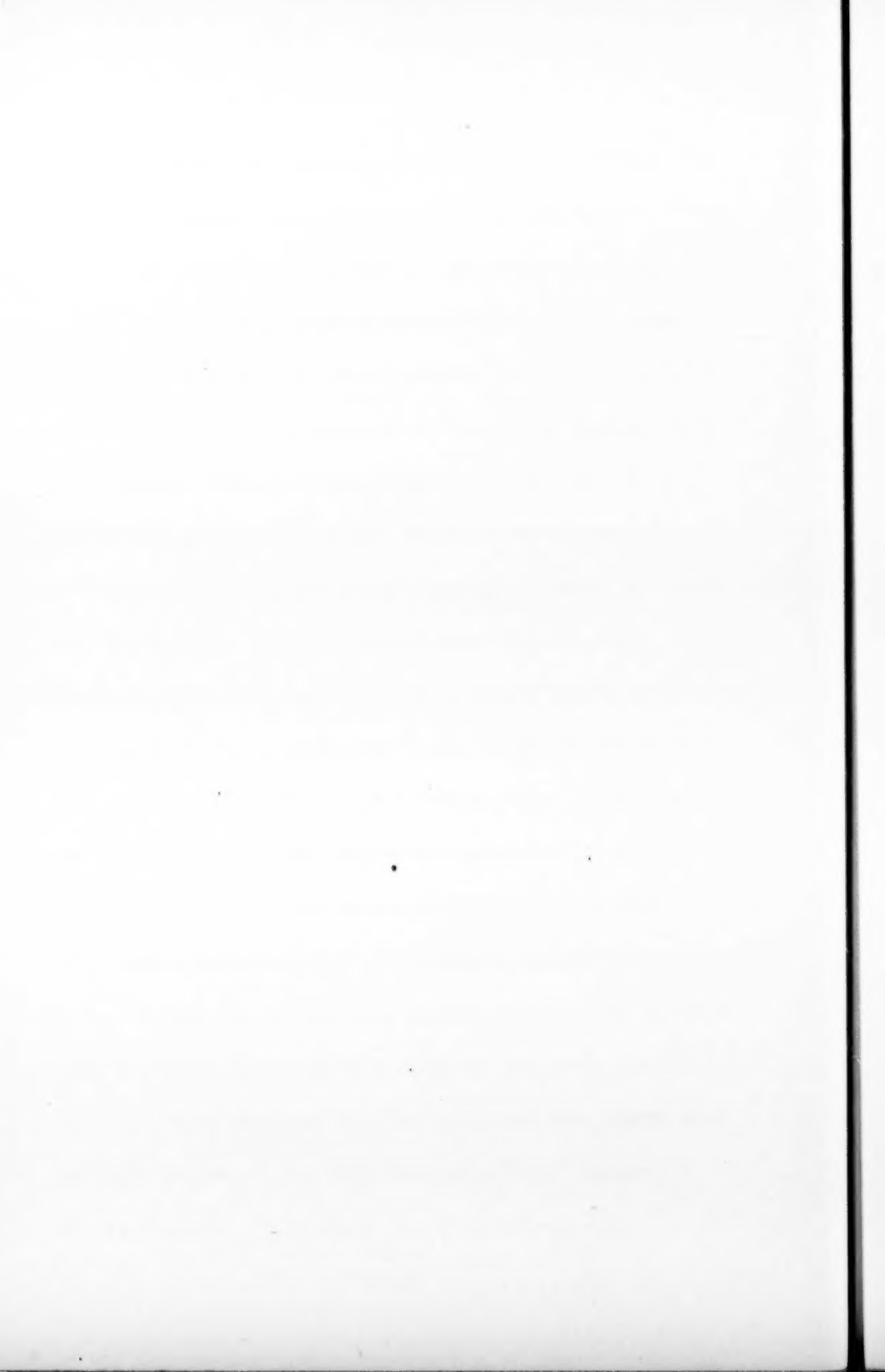


\$1988 to authorize a prevailing plaintiff to obtain more generous court-ordered attorney's fees from a defendant than the plaintiff's attorney might himself have fairly charged to the plaintiff in the absence of a fee-shifting statute. The billing experience I gained in 16 years of private practice strongly suggests to me that a very reasonable client might seriously question an attorney's bill of \$245,000 for services which had resulted solely in a monetary award of less than \$34,000. In this sense nearly all fees are to a certain extent "contingent," because the time billed for a lawsuit must bear a reasonable relationship not only to the difficulty of the issues involved but to the amount to be gained or lost by the client in the event of success or failure. Nothing in the language



of \$1988 or in the legislative history set forth above satisfies me that Congress intended to dispense with this element of billing judgment when a court fixes attorney's fees pursuant to the statute.

Thus, I conclude that it is likely that certiorari will be granted in either his case or City of McKeesport, or both, and that the likelihood of applicants' prevailing on the merits is sufficiently great to warrant the granting of a stay. Respondents contend that the supersedeas bond previously posted by applicants is inadequate to cover interest on the amount of the judgment, but this is an issue which may more properly be addressed in the first instance by the District Court.



## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, October 7, 1985, I served the within PETITIONERS' REPLY BRIEF in re: "City of Riverside vs. Santos Rivera" in the Supreme Court of the United States October Term, 1985, No. 85-224;

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.  
Executed on October 7, 1985  
at Los Angeles, California.

Kathleen Keltnerbach

7  
No. 85-224

Supreme Court, U.S.

FILED

DEC 18 1985

JOSEPH E. SPANIOLO, JR.

CLERK

In The  
**Supreme Court of the United States**  
October Term, 1985

CITY OF RIVERSIDE, LINFORD L. RICHARDSON,  
MICHAEL S. WATTS, DAN PETERS, GERALD  
MILLER, and ROBERT PLAIT,

*Petitioners,*

vs.

SANTOS RIVERA, JENNIE RIVERA, DONALD RI-  
VERA, JEROME RIVERA, LEE ROY RIVERA, MARK  
LARABEE, ENRIQUE FLORES, and MANUEL  
FLORES, JR.,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**JOINT APPENDIX**

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**Petition for Certiorari filed on August 9, 1985  
Certiorari granted on October 21, 1985**

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## RELEVANT DOCKET ENTRIES

| Date     | NR  | Proceedings                                                                                                                                                                                                                                                               |
|----------|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 6/ 4/76  | sam | 1. Fld complt. Issd summs.                                                                                                                                                                                                                                                |
| 6/24/76  | rlb | 3. Fld summs retrnd srvd 6/11/76 on all 32 defts, Karen E. Oakley accepted service for all defts.                                                                                                                                                                         |
| 7/ 1/76  | rlb | 4. Fld defts' ANSWER to Complaint & Demand For Jury Trial.                                                                                                                                                                                                                |
| 8/ 5/77  | caw | 58. Fld Defts' Note of Motn & Motn for S/J; memo of P/A in suppt of motn for S/J; affid of 23 Deft Police Officers in suppt thereof; rtble 9/19/77, 10 AM.<br><br>LODGED: 23 Defts' prop findgs of fet & concl of law.<br><br>LODGED: 23 Defts' prop S/J.                 |
| 9/12/77  | caw | Fld Pltf's Statmt of genuine issues purs to loc rls of Crt.<br><br>Fld Pltf's P/A in opp to Defts' motn for S/J; statmt of genuine issue affid of Pltfs., Santos Rivera & Jennie Rivera; Donald Rivera; Jerome Rivera; Lee Roy Rivera; Enrique Flores; Manuel Flores, Jr. |
| 9/20/77  | caw | Fld Pltf's supplmtl P/A in opp to Defts' motn for S/J.                                                                                                                                                                                                                    |
| 9/22/77  | caw | Fld Deft's rply to P/A in opp to Defts; motn for S/J affids of various Defts Officers & affid of Jonathan Kotler.<br><br>Fld Deft's supplmtl rply to P/A in opp to Defts' motn fo (sic) S/J.                                                                              |
| 9/26/77  | caw | MIN ORD: HRG re Deft's motn for S/J. Crt & cnsl confer. Addtnl affids to be fld by 10/7/77. Matter cont to 10/17/77, 10 AM.                                                                                                                                               |
| 9/30/77  | caw | Fld Deft's supplmtl affids in suppt of motn for S/J.                                                                                                                                                                                                                      |
| 10/ 4/77 | caw | Fld Pltf's opp p/A to Defts 2nd set of af-fids & rply P/A; addtnl affids of Pltfs.                                                                                                                                                                                        |



| Date     | NR  | Proceedings                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|----------|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 10/12/77 | caw | Fld Deft's resp to opp P/A to Defts' 2nd set of affids & rply P/A.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 10/14/77 | caw | Fld Deft's suppl affid in suppt of motn for S/J, of George Callow; Jon Olsen; Thomas Connor,<br><br>Fld Defts' suppl affid in suppt of motn for S/J of Richard Boyer.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 10/17/77 | caw | MIN ORD: PTC & HRG re Pltf's Motn to compl fur ans to interrogs & re Deft's motn for S/J. Crt & cnsl confer. Both motns tkn under submsn. PTC CONTD to 3/27/78, 10 AM.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 1/10/77  | lb  | Fld memo OPINION & ORD that the mot for S/J fld 8/5/77 are grntd as to R. Albee, P. Arellano, M. Boyer, R. Boyer, G. Callow, G. Carroll, T. Conner, R. Dana, E. Felcher, D. Gann, F. Grutzmacher, R. Haywood, I. Henery, G. Nisson, K. Qualls, J. Shively, & J. Tennell. As to the following defts the motn for S/J are den: J. Brading, D. Eltringham, J. Olsen, L. Richardson, M. Smith & D. Taulli.<br><br>Fld Jgmt: It is ORD that jgmt be entrd in favor of the following defts, dismiss w/ prej: R. Albee, P. Arellano, M. Boyer, R. Boyer, G. Callow, G. Carroll, T. Conner, R. Dana, E. Felcher, D. Gann, F. Grutzmacher, R. Haywood, I. Henery, G. Nissen, K. Qualls, J. Shively, J. Tennell. (Ent 1/12/78, mld epys to ptys, notfd ptys). |
| *4/16/79 | rlb | MIN ORD: Stat Conf hld in chambers: Cnsl plf to sub fur brief w/i 15 dys; any reply 1 wk thereafter; cnsl to file amnd list of exhbts.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 8/31/79  | rlb | MIN ORD: Sttlmnt conf hld; Crt to ntly cnsl of fur sttlmnt conf.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |



| Date     | NR  | Proceedings                                                                                                                                                                                                                                                              |
|----------|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 10/22/79 | rlb | MIN ORD: Sttlmnt conf hld in chambers: Crt to ntly ensl of trial dt.                                                                                                                                                                                                     |
| 9/16/80  | rz  | MIN ORD: P/T had. Crt signs P/T ORD. J/T (1st day) jury swm. Sw witns. Open stmts. Mkd exhbts. Juror #3 excused. ORD fur J/T contd to 9/17/80, 9:30 AM.                                                                                                                  |
| 9/17/80  | rz  | MIN ORD: Fur J/T (2nd day). Sw witns. Mkd exhbts. Fld note from jury. ORD fur J/T cont to 9/18/80, 9:30 AM.                                                                                                                                                              |
| 9/18/80  | rz  | MIN ORD: Fur J/T (3rd day). Fld depos of Donald B. Eltringham, Robert Plait, Michael J. Smith, Michael S. Watts & Jon E. Olsen. Sw witns. Mkd exhbts. Ord fur J/T cont to 9/19/80, 9:30 AM.                                                                              |
| 9/19/80  | rz  | MIN ORD: Fur J/T (4th day). Sw witns. Mkd exhbts. ORD cont to 9/22/80, 10:30 AM fr fur J/T.                                                                                                                                                                              |
| 9/22/80  | rz  | MIN ORD: Fur J/T (5th day). Sw witns. Mkd exhbts. Pltf rest. ORD furthr J/T cont to 9/23/80, 9:30 AM.                                                                                                                                                                    |
| 9/23/80  | rz  | MIN ORD: Fur J/T (6th day). Defts mks mot fr directed verdict as to defts James Brading, Jon Olsen, Don Eltringham & Fred Ferguson. Crt takes mot under subm. Fld note from jury. Fld defts prop jury instr. Sw witns, mkd exhbts. ORD fur J/T cont to 9/24/80, 9:30 AM. |
|          | rz  | MIN ORD: Fur J/T (7th day). Fld note fm jury. Sw witns. Mkd exhbts. Cnsl fr pltf to disp sections 1985 & 1986. Ord fur J/T cont to 9/25/80, 9 AM.                                                                                                                        |
| 9/25/80  | rz  | MIN ORD: Fur J/T (8th day). Sw witns. Cnsl rest. Crt & cnsl discuss jury instr. Cnsl fr deft makes mot to disp deft Michael Smith. Cnsl fr pltf makes mot fr directed verdict. Fld note fm jury. Ord fur J/T                                                             |

| Date     | NR | Proceedings                                                                                                                                                                                                                                                                       |
|----------|----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|          |    | cont to 9/26/80, 9 AM. Crt tks above mots under subm.                                                                                                                                                                                                                             |
| 9/26/80  | rz | MIN ORD: Fur J/T (9th day). Crt grants directed verdict as to Fred Ferguson & denies said mot as to James Brading, Don Eltringham, Jon Olsen, Michael Smith, & pltfs mots fr directed verdict. Clos argu-<br>mts. Crt instr. Jury delib. Ord fur J/T<br>cont to 9/29/80, 9:30 AM. |
| 9/29/80  | rz | MIN ORD: Fur J/T (10th day). Jury<br>delib. Fld notes fm jury. Crt perter reads<br>test of Officer Bradings to jury. Ord fur<br>J/T conf to 9/30/80, 9:30 AM.                                                                                                                     |
| 9/30/80  | rz | MIN ORD: Fur J/T (11th day) jury de-<br>lib. ORD fur J/T cont to 10/1/80, 9:30 AM.                                                                                                                                                                                                |
| 10/ 1/80 | rz | MIN ORD: Fur J/T (12th day) Jury de-<br>lib. Fld notes fm jury. Crt repters reads<br>test of officer Watts. Ord fur J/T cont<br>to 10/2/80, 9:30 AM.                                                                                                                              |
| 10/ 2/80 | rz | MIN ORD: Fur J/T (13th day). Crt &<br>cnsl discuss notes fm jury. Fld notes fm<br>jury. Crt repter testim of Officer Webster<br>& pltf LeRoy Rivera. Ord fur J/T cont to<br>10/30/80, 9:30.                                                                                       |
| 10/ 3/80 | rz | MIN ORD: Fur J/T (14th day). Crt &<br>cnsl discuss notes fm jury in chambers.<br>Cnsl stip to off the record. Fld notes fm<br>jury. Crt rpter reads test of Enrique<br>Flores. Ord fur J/T cont to 10/6/80, 9:30<br>AM.                                                           |
| 10/ 6/80 | rz | MIN ORD: Fur J/T (15th day). Jury<br>delib. Crt rpter reads test of Officer Pe-<br>ters to jury. Ord fur J/T cont to 10/7/80,<br>9:30 AM.                                                                                                                                         |
| 10/ 7/80 | rz | MIN ORD: Fur J/T (16th day). Jury<br>delib. Fld notes fm jury. Fld verdicts in<br>fav of pltfs & against defts. Pltf to mk his                                                                                                                                                    |

| Date     | NR  | Proceedings                                                                                                                                                                                                                                                                                                                                                  |
|----------|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|          |     | mot fr atty fees & additur & note said mot fr 11/10/80 at 9:30 AM resp if any 11/5/80. Fld list of exhbt & witns.                                                                                                                                                                                                                                            |
| 12/ 1/80 | rlb | Fld plfs' nte of mot & mot, rtnble 12/15/80, for reasonable attys fees & costs.                                                                                                                                                                                                                                                                              |
| 1/ 7/81  | rlb | Fld defts' memo of P/s & delrtn Kotler in suppt in rsp to mot by plfs for attys fees & costs.                                                                                                                                                                                                                                                                |
| 1/ 8/81  | rlb | Fld affd Winslow in suppt plfs' mot for reasonable attys fees & costs. Fld suppl affd Lopez In suppt plfs' mot for reasonable attys fees & costs.                                                                                                                                                                                                            |
| 1/12/81  | rlb | Fld plfs' opp to defts' mot for reasonable attys fees & costs. Fld plfs' proof of srv of opp to defts mot, etc.                                                                                                                                                                                                                                              |
| 1/14/81  | rlb | Fld defts' suppl memo of P As in rsp to mot by plfs for attys fees & costs & in suppt mot defts for attys fees & costs.                                                                                                                                                                                                                                      |
| 1/19/81  | rlb | MIN ORD: HRG plf mot for atty fees; deft's mot for atty fees; Plf's mot Granted deft's mot Denied.                                                                                                                                                                                                                                                           |
| 2/ 6/81  | lp  | LODGED proposed judgmnt.                                                                                                                                                                                                                                                                                                                                     |
| 4/ 3/81  | lp  | Fld Judgmnt & ORD in favor of pltf Santos Rivera & against 37 defts in different amt (See Judgmnt). ORD & decreed that plf mot for reasonabl attys' fees & costs is grnated. deft are ord to pay pltf's reasonable attys' fees in amt of \$245. 456.25. ORD that defts' mot for attys fees & costs is denied. (ENT 4/7/81) Mld cpys. Mld note ptys. MD JS-6. |
| 4/ 3/81  | lp  | Fld findings of fact & conclusions of law (ENT 4/7/81) Mld cpys. Mld note ptys.                                                                                                                                                                                                                                                                              |
| 4/24/81  | lw  | Fld deft's NOTC OF APPEAL to 9th Cir C/A frm Jdgmnt ent 4/7/81 \$70.00 fldng & docket fees pd.                                                                                                                                                                                                                                                               |

| Date      | NR | Proceedings                                                                                                                                                                     |
|-----------|----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 5/ 1/81   | lp | Fld deflt statmnt of issues on appeal & designation of sections of reporter's transcript.                                                                                       |
| *6/24/81  | yd | Fld Bond for undertkng on appeal fr Fidelity & Deposit Co. in amount of \$245,-456.25, bond #6050986                                                                            |
| *6/22/81  | yd | MIN ORD: Crt sets bond in amount of \$245,000.00. Said bond to be posted in by 6/24/81.                                                                                         |
| *10/24/83 | eg | ORD that mandate of USCA, 9th Cir. fld & spread. Court to look fur at declar & settle iss of atty fees.                                                                         |
| 6/ 6/84   | gs | MIN ORD: Stat conf.                                                                                                                                                             |
| 7/23/84   | sa | Resp & opp to pltfs prop findings of fact & Conel of law.                                                                                                                       |
| 7/26/84   | nm | ORD grtg pltf's mot for atty's fees & costs. Defts ORD to pay pltfs atty's fees of \$245,-456.25. FUR ORD den defts mot for atty's fees & costs. (ENT 7/30/84) cc-ptys w/ note. |
| 8/23/84   | sw | Fld deflt's NOTC OF APPEAL to 9th Cir C/A frm ord ent 7/30/84; \$70.00 flg & dkt fee paid.                                                                                      |

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RELEVANT PLEADINGS, FINDINGS,  
CONCLUSIONS, OPINIONS, ORDERS  
& JUDGMENTS

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

No. CV 76-1803-F

SANTOS RIVERA, et al.,  
Plaintiffs,

v.

CITY OF RIVERSIDE, et al.  
Defendants.

Filed: January 10, 1978  
Clerk, U.S. District Court  
Central District of California

MEMORANDUM OPINION AND ORDER

Twenty-three of the thirty-two defendants named in this case have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendants filed affidavits in support of their motions and the plaintiffs submitted counter affidavits in response. The defendants' motions were first heard on September 26, 1977. Additional affidavits were subsequently filed by both plaintiffs and defendants and the matter was taken under submission by the court. For the reasons stated below the motions will be granted as to 17 of the moving defendants, and denied as to 6 others.

It is a well-established rule that on a motion for summary judgment the moving party bears the burden of demonstrating the absence of any genuine issue of fact and of establishing that he is entitled to prevail as a matter of law. *Jones v. Halekulani Hotel, Inc.*, 557 F.2d 1308 (9th

Cir. 1977). Therefore, in considering the instant motions, the court must view the allegations of the complaint and the facts supporting them in the light most favorable to the plaintiffs. Nevertheless, in order to overcome a defendant's summary judgment motion, it must appear that the facts, when so construed, support a viable legal theory which would entitle the plaintiffs to a judgment against that defendant for the acts complained of. *Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977). Bearing these principles in mind, and having carefully considered the affidavits and arguments presented by both sides, the court has made the following determinations:

1. As to the defendants Callow and R. Boyer the plaintiffs do not oppose the motions for summary judgment. These officers were not present at the scene of the incident which forms the major basis for the plaintiffs' complaint.

2. As to the defendants Albee, Arellano, M. Boyer, Carroll, Conner, Dana, Felcher, Gann, Grutzmacher, Haywood, Henery, Nissen, Qualls, Shively and Tennell, the court finds that there are no genuine issues of fact remaining to be litigated in this case. These defendants were present at the scene of the incident, and several of them entered the Rivera residence in response to orders from their commanding officer. However, their affidavits establish that they did not have any physical or verbal contact with any of the plaintiffs, did not participate in the arrest or search of any of the plaintiffs, and did not personally engage in any conduct which violated the plaintiffs' civil rights. The responsive affidavits filed by the plaintiffs are not sufficient to overcome this showing because



none of the actions of these individual defendants which are referred to in the affidavits rise to the level of constitutional violations.

Furthermore, in their affidavits these defendants all deny having participated in any manner in a conspiracy or in any concerted action to violate the civil rights of the plaintiffs. Even accepting the broadest view of the scope of the schemes and conspiracy allegations of plaintiffs' complaint, these defendants have sworn that they were not a part of any such activity. No triable issue on this point is raised by the mere fact that these defendants were present at the time of the incident in question, or that they made arrests or conducted searches of persons other than the plaintiffs. Also, no reasonable inference of an unlawful conspiracy can be drawn from the fact that some of these defendants conferred with each other before writing reports about the incident or that their reports were similar in content.

Likewise, plaintiffs' argument that there are genuine issues as to possible negligent violations of their civil rights by these defendants must fail. *Cf. Navarette v. Enomoto*, 536 F.2d 277 (9th Cir. 1976), *cert. granted*, 429 U.S. 1060 (1977). The defendants all deny having seen any violations of civil rights by other officers, and they deny withholding information or exculpatory evidence. Again, no triable issue is raised by their mere presence at the scene. *Cf. Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972), relied on by plaintiffs to support their argument on this point. In *Byrd* the Court of Appeals reversed a directed verdict in favor of three police officers who, it was established, were present in the back room of a bar with a dozen other officers who surrounded the plaintiff as he was

severely beaten. In such a case, a reasonable question as to negligence is clearly raised by mere presence, since awareness of the civil rights violation taking place is obvious. There is no indication whatsoever that such an extreme situation is involved in this case.

3. Regarding the other six moving defendants it appears to the court that there are material factual issues which cannot be resolved on the motions for summary judgment.

a. As to the defendants Smith and Taulli the plaintiffs point to answers to interrogatories indicating that these two officers assisted in the follow-up investigation which led to the filing of criminal complaints against some of the plaintiffs. Part of the alleged civil rights violations covered by plaintiffs' complaint concern these charges. Since the affidavits filed by these defendants do not address their participation in the investigation and any role they may have played in recommending prosecution of the plaintiffs, they are insufficient to support a summary judgment at this time.

b. Affidavits submitted by the plaintiffs regarding the defendants Eltringham and Olsen raise a genuine issue as to possible civil rights violations by those defendants as a result of their surveillance of the Rivera residence from a police helicopter on the night in question. The defendants deny direct physical contact with any of the plaintiffs, but their affidavits do not address the plaintiffs' allegations of harassment and invasion of privacy. It also appears that there is a material factual dispute regarding the claims of these defendants that they issued a dispersal order from their helicopter before any officers entered the



Rivera residence. Therefore, their motions for summary judgment cannot properly be granted.

c. As to the defendant Richardson there remains an issue of possible liability based on his allegedly having ordered a "stake-out" of the Rivera residence and his request for additional officers to report to the scene. The affidavits submitted by this defendant do not refer to these orders.

d. There are conflicting affidavits on the question of whether the defendant Brading personally participated in the arrest and booking of the plaintiff Jerome Rivera. Such a conflict must be resolved against the defendant on this motion for summary judgment and his motion will therefore be denied.

IT IS THEREFORE ORDERED that the motions for summary judgment filed on August 5, 1977 are granted as to the following defendants:

|                |                  |
|----------------|------------------|
| Richard Albee  | Ernest Felcher   |
| Peter Arellano | Daniel Gann      |
| Mark Boyer     | Fred Grutzmacher |
| Richard Boyer  | Robert Haywood   |
| George Callow  | Ivan Henery      |
| Gerald Carroll | Gary Nissen      |
| Thomas Conner  | Kenneth Qualls   |
| Richard Dana   | John Shively     |
|                | James Tennell    |

As to the following defendants, the motions for summary judgment filed on August 5, 1977 are denied:

|                   |                    |
|-------------------|--------------------|
| James Brading     | Linford Richardson |
| Donald Eltringham | Michael Smith      |
| Jon Olsen         | Don Taulli         |

IT IS FURTHER ORDERED that the clerk forthwith serve copies of this memorandum opinion and order by United States mail upon counsel for the parties appearing in this action.

Dated this 9th day of January, 1978.

/s/ Warren J. Ferguson  
United States District Court

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(Caption omitted in printing)

No. CV 76-1803-F

Filed: January 12, 1978  
Clerk, U.S. District Court  
Central District of California

Entered: January 13, 1978  
Clerk, U.S. District Court  
Central District of California

### JUDGMENT

Pursuant to the memorandum opinion and order filed in this case on January 10, 1978,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment be entered in favor of the following defendants, dismissing plaintiff's complaint with prejudice:

Richard Albee  
Peter Arellano  
Mark Boyer  
Richard Boyer  
George Callow  
Gerald Carroll  
Thomas Conner  
Richard Dana

Ernest Felcher  
Daniel Gann  
Fred Grutzmacher  
Robert Haywood  
Ivan Henery  
Gary Nissen  
Kenneth Qualls  
John Shively  
James Tennell

IT IS FURTHER ORDERED that the clerk forthwith serve copies of this judgment by United States mail upon counsel for the parties appearing in this action.

Dated this 12th day of January, 1978.

/s/ Warren J. Ferguson  
United States District Court

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CAZARES & TOSDAL  
Attorneys at Law  
225 Broadway, Suite 1352  
San Diego, Ca 92101  
Telephone: (714) 233-6581  
Attorneys for Plaintiffs

(Caption omitted in printing)

No. CV 76-1803-MRP

NOTICE OF MOTION AND MOTION BY PLAINTIFFS  
FOR REASONABLE ATTORNEYS FEES  
AND COSTS

TO: THE DEFENDANTS AND THEIR COUNSEL  
OF RECORD:

PLEASE TAKE NOTICE that on Monday, December 15, 1980, or as soon thereafter as counsel may be heard in the Courtroom of the Honorable Marianna R. Pfaelzer, District Judge, plaintiffs will move this Court for Attorneys Fees and Costs pursuant to 42 U.S.C. 1988.

Said motion will be based on the attached Memorandum of Law and the accompanying Affidavits.

DATED: 12/1/80

Respectfully submitted,

/ss/ Roy B. Cazares  
ROY B. CAZARES

INTRODUCTION

This memorandum or points and authorities will inform the court of the issues and authority relevant to an award of attorneys' fees in the present case. Roy Cazares and Gerald Lopez, plaintiffs' attorneys, have dedicated themselves to this civil rights action for the last five years.

Having at last prevailed on the merits, plaintiffs now desire that the court award attorneys' fees pursuant to 42 U.S.C. 1988—the Attorney's Fees Awards Act of 1976. This memorandum will demonstrate the compelling need for awards of attorneys' fees in civil rights litigation, and the propriety of the requested award in this case.

## I.

### PLAINTIFFS' ENTITLEMENT TO AN AWARD OF FEES UNDER 42 U.S.C. 1988

42 U.S.C. 1988 provides, in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

Section 1988 vests the court with the discretion to award attorneys' fees in this case. Although the statute fails to specify when an award of fees is appropriate, the legislative history firmly commands that "a party seeking to enforce the rights protected by the statutes covered by S. 2278 [1988] 'should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust' *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) *quoted in* S. Rep. No. 94-1011, 94th Cong. 2nd Sess. 4 (1976). A brief overview of the circumstances which led to the enactment of section 1988 will help to explain the adoption of the stringent standard of *Newman v. Piggie Park*.

Section 1988 was enacted in response to the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In *Alyeska*, the Court

disapproved a line of lower court cases in which attorneys' fees had been granted on a private attorney general theory in civil rights actions based on the Reconstruction statutes, 42 U.S.C. 1981-1983 and 1985-1986. The lower courts had justified the awards on two grounds: first, that the civil rights actions furthered the public interest, and second, that since fees were specifically provided in the more modern civil rights statutes, it would be anomalous to deny them in cases brought pursuant to the Reconstruction amendments. *See, Comment, Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fees Awards Act of 1976*, 47 UNIV. OF CHI. L. REV. 332 (1980). *Alyeska* rejected this newly created exception to the so-called "American Rule" against awarding attorney's fees to prevailing parties because the exception constituted a judicial invasion of "the legislature's province." *Alyeska, supra*, at 271. Congress' response was extraordinarily swift and unequivocal. It enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, allowing the award of attorney's fees to prevailing parties in suits to enforce the Reconstruction statutes.

Viewed in this context, section 1988 clearly embodies Congress' commitment to the enforcement of civil rights. The legislative history demonstrates Congress' concern that, in many instances, important rights would not be vindicated if counsel could not be employed to undertake civil rights litigation. By permitting fee-shifting, Congress sought to ensure the continued litigation of civil rights actions — to guarantee that "civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce . . ." S. Rep. No. 94-1011, 94th Cong., 2nd Sess. 6 (1976).



The Ninth Circuit has followed the congressionally-approved standard of *Newman v. Piggie Park*. In *Sethy v. Alameda County Water District*, 602 F.2d 894, 897 (9th Cir. 1979), the court recognized that "Congress plainly intended that successful plaintiffs 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' S. Rep. No. 94-1011, 94th Cong. 2nd Sess. 4, reprinted in U.S. Code Cong & Admin News pp. 5908, 5912 quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968)." Courts in the Ninth Circuit have likewise acknowledged the importance of attorneys' fees as a means of encouraging civil rights actions. In *Keith v. Volpe*, No. CV-72-355-HP 6 (C.D. Cal., March 31, 1980), a 1983 action decided in the Central District of California, Judge Pregerson noted that "[c]ivil rights plaintiffs who, more often than not, bear the burdens that accompany poverty and minority status in our society, should be encouraged to use the federal courts to avail themselves of the promise of equality that abides in the Constitution."

Plaintiffs submit that an award of fees in this case is appropriate. Both the legislative history and the cases in this Circuit support the necessity of such an award as a means of fulfilling important policies reflected both in section 1988 and in the Reconstruction statutes generally.

## II.

### RETROACTIVITY

Although the present case commenced prior to the enactment of section 1988, plaintiffs' attorneys should be compensated for the entire period during which they rendered legal services. Section 1988 applies retroactively to all cases which were pending in 1976, the year of its adoption.

In *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974), the Supreme Court held that an attorneys' fees statute should be retroactively applied to cases pending when the statute is passed. The Court based its holding on the principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory discretion or legislative history to the contrary." *Bradley, supra*, at 711.

The legislative history of section 1988 leaves no doubt that section 1988 incorporates the rule in *Bradley*. The House Report, which specifically addresses the issue of retroactivity, states:

In accordance with the applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of the enactment as well as all future cases. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974) in H.R. Rep. No. 94-1558, 94th Cong. 2nd Sess. 4, n.6 (1976).

The Ninth Circuit, moreover, in *Stanford Daily v. Zurcher*, 550 F. 2d 464 (9th Cir. 1977), expressly approved the retroactivity of section 1988 in affirming an award of fees which had been made by the District Court prior to the enactment of section 1988 in *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974). Thus, the rule of retroactivity approved both in the legislative history and by this Circuit supports plaintiffs' claim that all services rendered in this case should be compensated.



## III

FACTORS TO BE CONSIDERED BY THE COURT  
IN DETERMINING THE AMOUNT OF FEES TO  
BE AWARDED

The amount of fees to be awarded pursuant to section 1988 is another issue which was addressed by Congress in the legislative history of the Act. The Senate Report states:

It is intended that the amount of fees awarded under S. 2278 [1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as *antitrust cases* and *not be reduced because the rights involved may be non-pecuniary* in nature. . . . In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter." S.Rep. No. 94-1011, 94th Cong., 2nd Sess. 6 (1976) (emphasis added).

Courts confronted with the task of determining the amount of fees to be awarded generally begin with the calculation of a base figure which reflects the amount of time reasonably expended. Then, in accordance with the legislative history, they adjust the award so that it comports with the standards of other "equally complex Federal litigation, such as antitrust cases." Plaintiffs will likewise address the issues in this sequence.

## A. DETERMINATION OF A REASONABLE HOURLY RATE

An attorney's reasonable hourly rate serves as a basis for subsequent calculations leading to an award of fees. The legislative history of section 1988 suggests that the

reasonable hourly rate should be based on a consideration of twelve factors. These factors were set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), a title VII case which was expressly approved in the legislative history of section 1988. See S.Rep. No. 94-1011, *supra*, at 6. According to *Johnson*, these factors are: time and labor required; novelty and difficulty of the questions; skill requisite to perform the legal service properly; preclusion of other employment by the attorney due to acceptance of the case; customary fee; whether the fee is fixed or contingent; amount involved and results obtained; experience, reputation and ability of the attorneys; undesirability of the case; nature and length of the professional relationship with the client and awards in similar cases.

The *Johnson* factors serve as a basis for evaluation of a reasonable hourly rate in this case. As the remainder of this memorandum and the affidavits of Roy Cazares and Gerald Lopez demonstrate, the present case required enormous expenditures of time and demanded legal arguments on complex and untested theories. The contingent nature of the fees, and the favorable verdict obtained also militate in favor of a generous estimate of the reasonable hourly rate. Finally, the skill and reputation of plaintiffs' counsel must be recognized. With regard to this factor, the *Johnson* court stated:

Most fee scales reflect an experience differential with the more experienced attorneys receiving larger compensation. An attorney specializing in civil rights may enjoy a higher rate for his expertise than others, providing his ability corresponds with his experience. Longevity *per se*, however, should not dictate the higher fee. If a young attorney demonstrates the skill

and ability, he should not be penalized for only recently being admitted to the bar. *Johnson, supra*, at 718-19.

The professional conduct of Messrs. Cazares and Lopez in this case reflects a thorough knowledge of civil rights as well as complete command of litigation skills. These are the factors which must be focused upon in evaluating the experience, reputation and ability of plaintiffs' counsel. Plaintiffs therefore contend that, applying the *Johnson* factors to this case, this Court is justified in awarding \$125.00 per hour as a reasonable hourly rate.

## B. THE PROPRIETY OF A MULTIPLIER

The reasonable hourly rate multiplied by the number of hours expended provides a base figure, or lodestar. Once the lodestar has been fixed, it is appropriate for the Court to award successful plaintiffs a multiplier of the lodestar—that is, the court may double, triple or quadruple the lodestar. The legislative history of section 1988 supports the propriety of a multiplier, as is evidenced by its specific reference to fee awards in anti-trust cases. S.Rep. No. 94-1011 *supra* at 6. In the leading anti-trust attorneys' fees case of *Lindy Brothers Builders of Philadelphia v. American Radiator and Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), the court suggested that the multiplier be determined in light of both the contingent nature of success and the quality of the attorneys' work. The court emphasized that attorneys' fees cannot properly be determined merely by multiplying the hourly rate for each attorney times the number of hours devoted to the case.

The contingency and quality factors suggested by *Lindy* weigh heavily in favor of a multiplier in the present

case. The *Lindy* court noted the special significance of the contingency factor "where the attorney has no private agreement that guarantees payment even if no recovery is obtained..." *Lindy supra* at 168. In this case plaintiffs' counsel had no fee agreement. Had the jury returned a verdict for defendants, these attorneys would have received no compensation for their five years of labor.

The quality factor likewise supports a multiplier. The *Lindy* court stated that "[i]n evaluating the quality of an attorney's work in a case, the district court should consider the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of recovery obtained." *Lindy supra* at 168. This court is well-aware of the complexity of legal issues presented and the high quality of representation in the present case. In considering the amount of recovery, plaintiffs urge the court to consider both its pecuniary and non-pecuniary implications. Because the verdict in this case resulted in the successful assertion of constitutional rights, a goal endorsed by Congress in the legislative history, it must be valued in terms which exceed the monetary damages awarded. All of these elements justify plaintiffs' request for a multiplier of two in the present case.

The reasonableness of plaintiffs' request is supported by other cases in which a multiplier was granted. A brief review of decisions in anti-trust cases and then in public interest cases will inform the Court as the range of possible multipliers. In *Lindy*, for example, the district court, on remand, doubled the amount obtained by mere application of the hourly rate in order to account for the contingency and quality factors. 382 F.Supp. 999, 1024 (E.D. Pa. 1974). Attorneys in *Lindy* were awarded a fee of \$1,134,855.00 (or

\$229/hour for 6,000 hours) though criminal prosecutions had preceded the filing of the complaint, though the suit was ultimately settled, and though petitioning counsel received an additional \$861,000.00 through private 33.3% contingent fee contracts.

In *In re Gypsum Cases*, 386 F.Supp. 959 (N.D. Cal. 1974), Judge Zirpoli relied on the *Lindy* factors and multiplied the hourly rate by three. The court underscored the role of the multiplier in encouraging private enforcement of anti-trust laws.

In *Philadelphia v. Charles Pfizer and Co. Inc.*, 345 F.Supp. 454 (S.C. N.Y. 1972), plaintiffs' counsel were awarded \$600,000.00 or an average of \$300.00 per hour. This fee was awarded despite the fact that most of the hours were devoted to fairly uncomplicated work, some of which was said to be duplicative, unwise or unnecessary. In *Arenson v. Board of Trade of City of Chicago*, 373 F.Supp. 1349 (N.D. Ill. 1974), a multiplier of four was awarded. Finally, in an unpublished opinion in *Goldstein v. Alodex Corp.*, Civ. No. TI — 1857 (E.D. Pa., Dec. 7, 1973), a multiplier of five was awarded.

Congress, in suggesting that antitrust multipliers be the model in awards pursuant to section 1988, was not breaking new ground. In many earlier public interest cases decided in this Circuit, multipliers had been awarded based on the same factors emphasized in *Lindy* — contingency of the case and the quality of representation. See, e.g., *Coalition for Los Angeles Planning in the Public Interest v. Board of Supervisors*, L.A. Sup. Ct. No. C-63218 (1976) (multiplier of two in environmental lawsuit); *Serrano v. Priest*, No. C-933-254 (L.A. Co. Sup. Ct. April



1975) (multiplier of two in school financing case); *Davis v. County of Los Angeles*, 8 EPD ¶9444 (C.D. Ca. 1974) (bonus of \$7,193.42 in employment discrimination case); *WACO v. Alioto*, C-70-1335-WTS (Findings and Recommendations Re Attorneys' Fees, September 19, 1974) (multiplier of two and multiplication again by a 50% factor in section 1983 employment discrimination case). Thus, the courts of this Circuit have recognized that multipliers, just as they encourage private enforcement of anti-trust laws, further the vindication of important rights and policies in public interest cases. To maximize the impact of attorneys' fees acts, the fees awarded "should be large enough to make the case desirable despite the risk of loss." *Palmer v. Rogers*, 10 E.P.D. ¶10,499 at 6131 (D.D.C. 1975) (Title VII action).

Courts in the Ninth Circuit, in accordance with the legislative history of section 1988 and with the decisions in other public interest cases, have, moreover, awarded multipliers and bonus awards in cases brought under the Civil Rights Attorney's Fees Awards Act. In *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), the district court awarded a bonus of \$10,000.00; this award, as noted above, was later approved by the Ninth Circuit as consistent with section 1988. *Stanford Daily v. Zurcher*, 550 F.2d 464 (9th Cir. 1977). More recently, in *Keith v. Volpe*, No. CV-72-335-HP (C.D. Cal., March 31, 1980), Judge Pregerson reaffirmed the *Lindy* method of computing reasonable attorney's fees awarding plaintiffs a multiplier of 3.5. Such a multiplier was intended to reflect the contingent nature of the case, the quality of counsel's efforts, the effect of the delay between the time services were rendered and the date in which the order determining

fees was entered, and finally, the impact of inflation. *Keith v. Volpe*, *supra* at 27.

Plaintiffs contend that the use of a multiplier is appropriate in this case. It is justified by the legislative history, by similar awards in public interest and anti-trust cases, and by awards granted pursuant to section 1988 within the Ninth Circuit. Moreover, the two factors which weigh most heavily in favor of a multiplier — quality of representation and the contingent nature of success — compel such an award in the present case. Finally, a multiplier is appropriate because it reinforces the policies of section 1988 by providing attorneys with an incentive to litigate legitimate civil rights claims even when the theoretical and practical obstacles are great.

### C. COMPENSATION FOR TIME SPENT IN APPLYING FOR FEES

Plaintiffs seek to recover attorneys' fees for time spent by their counsel in preparing and presenting this motion. The propriety of such an award becomes evident when viewed in light of the legislative history and the policies of section 1988. The Senate Report recognized that "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S.Rep.No. 94-1011, 94th Cong. 2nd Sess. 2 (1976). The "essential remedy" sought to be afforded by section 1988 will be significantly diluted if attorneys are not compensated for time spent in applying for fees. *See, e.g., Prandini v. National Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978).



Much time has been devoted to preparing the motion for fees in this case. Plaintiffs' counsel, in addition to establishing the legal basis for their entitlement to fees, have had to sift through records and accounts generated during the last five years. Moreover, there is no assurance that further litigation relating to the matter of fees will not ensue. As the court in *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 684 (N.D. Cal. 1974) noted, if such work were not compensated, it "would allow parties to dilute the value of a fees award by forcing attorneys into extensive uncompensated litigation in order to gain fees." By allowing attorneys' fees for the time spent on the fee question, this Court can prevent potential disincentives to attorneys undertaking civil rights litigation, and thus further the policies of section 1988.

#### D. LAWCLERK AND PARALEGAL SERVICES

Plaintiffs request the Court to include charges for law clerk/paralegal services as part of the attorneys' fees award. The Ninth Circuit has approved the inclusion of these charges in fee awards. *See, e.g., Pac. Coast Agr. Export Assn' v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 (9th Cir. 1975); *cert. den.* 425 U.S. 959 (1976) (award of fees for work of legal assistants in anti-trust action); *Keith v. Volpe*, No. CV-72-355-HP 24 (C.D.Cal., March 31, 1980) (section 1983 action). In allowing law clerk and paralegal charges in *Keith*, Judge Pregerson recognized that lawclerks and paralegals provide necessary services which, were they performed by attorneys, would be more costly. On this basis, plaintiffs have submitted law clerk time as part of their motion for fees.

## E. COSTS AND EXPENDITURES

Plaintiffs contend that travel expenses necessarily incurred during the course of litigation should be awarded. In *Keith v. Volpe*, No. CV-72-355-HP 27 (1980), plaintiffs were awarded out of town travel expenses. The Court recognized that these expenditures were of the type which would ordinarily be charged to the client and concluded that equity required that plaintiffs counsel be reimbursed. *See also, Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165 (1939) (power of court to award "as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit ...") In the present case an award of travel expenses is equally justified. Plaintiffs' attorneys, residents of San Diego, made numerous trips to Los Angeles and to Riverside in connection with the litigation. These expenses are not compensated by an award of fees and should be granted in addition to any fees awarded in this case.

## IV

### PLAINTIFFS ARE ENTITLED TO AN INTERIM AWARD OF FEES

Having prevailed in the instant action, plaintiffs contend that they are entitled to an interim award of fees. Plaintiff's attorneys have expended considerable time and expense over a five year period without compensation. As outlined in plaintiffs points and authorities above, the legislative history of Section 1988 clearly indicates that attorney fee awards are an important component of Congress' efforts to insure that even the poor will have access to the Courts to vindicate Constitutional rights. While Section 1988 does not provide a specific time for the

awarding of attorney fees, it is reasonable to conclude that the awarding of interim fees promotes the vigilant protection of constitutional rights and promotes the public policy embodied in the Civil Rights Acts.

The Ninth Circuit, as well as other circuits, has recognized the propriety of awarding interim attorney fees. *Shaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972) (description without comment by Ninth Circuit of interim fee procedure utilized by District Court); *Davis v. County of Los Angeles*, 8 FEP Cases 244, 8 E.P.D. ¶ 9444 (C.D. Calif. 1974) (\$60,000 interim fee award made without discussion of pending appeal and without the requirement of a bond); *Peters v. Missouri Pacific R.R. Co.*, 3 E.P.D. ¶ 8274 (E.D. Tex. 1971) (fees awarded by District Court, without (sic) mention of pending appeal, but the existence of such an appeal is shown by appellate court decision at 483 F.2d 490 (5th Cir. 1973)). See also *Highway Truck Drivers and Helpers Local 107 v. Cohen*, 220 F.Supp. 735 (E.D. Pa. 1973) (fees awarded despite pending appeal in case under Labor Management Reporting and Disclosure Act). In *Malone v. North American Rockwell Corporation*, 457 F.2d 779 (9th Cir. 1972), the Ninth Circuit held that plaintiffs were entitled to an interim award even though they had prevailed solely on a procedural issue (the Title VII Statute of Limitations) and despite the fact that there had not been a decision on the merits. See also *Kaplan v. Iatse*, 525 F.2d 1354 (9th Cir. 1975).

Moreover, the Second Circuit has recently held in *Johnson v. University of Bridgeport, Inc.*, Nos. 80-7350, 80-7374 (August 28, 1980), that an award of attorneys' fees is an integral part of the relief sought in a civil rights ac-

tion and therefore the judgment is not final and appealable until they have been set by the court.

Plaintiffs assert that interim attorneys' fees in the instant case are not only proper, but said award would promote the underlying policy of Section 1988.

## V

### CONCLUSION

Based on the facts and points outlined above as well as in the affidavits and exhibits attached hereto, it is submitted that the amount of time expended on this case is reasonable, that the hourly rates requested are reasonable, that a multiplier or bonus is appropriate in this case, and that therefore this Honorable Court should make an award herein of \$495,713.51 as follows:

|                                                            |                     |
|------------------------------------------------------------|---------------------|
| Law clerk/paralegal hours                                  | \$ 2,112.50         |
| Hours expended by Roy B. Cazares                           |                     |
| 692.75 hours X \$125.00 per hour =                         |                     |
| \$86,593.75 X multiplier of two (2) =                      | \$173,187.50        |
| Hours expended by Gerald Paul Lopez,                       |                     |
| 1,265.50 X \$125.00 = 158,187.50 X multiplier of two (2) = | \$316,375.00        |
| Costs incurred (Exhibit C)                                 | \$ 4,038.50         |
| <b>TOTAL AWARD REQUESTED</b>                               | <b>\$495,713.51</b> |

DATED: 12/1/80

Respectfully submitted,  
/s/ Roy B. Cazares

DATED: 12/1/80

Respectfully submitted,  
/s/ Gerald P. Lopez

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(Caption omitted in printing)

NO. CV 76-1803-MRP

**AFFIDAVIT OF GERALD P. LOPEZ**

**RE: AMOUNT OF ATTORNEYS FEES REQUESTED**

GERALD P. LOPEZ, being duly sworn, deposes and says:

1. I am co-counsel for the plaintiffs in the above-captioned action. I make this affidavit in order to bring to the Court's attention certain facts which are relevant to the amount of fees requested in the accompanying application.

2. The memorandum of law filed concurrently with this affidavit shows that in determining the amount of the fees to be awarded, the usual practice is for the Court first to determine the number of hours expended and the appropriate hourly rate and then to calculate a base figure, a "lodestar", based on hours expended times hourly rate. The next step is to make adjustments from the base figure based on such factors as the contingent nature of the receipt of the fees and the result obtained for those represented. With this in mind, the remainder of this affidavit is divided into four sections, as follows: The Attorneys' Hourly Rates; The Number of Hours Expended; The Appropriate Adjustments to the Normal Rates; and The Conclusion.

**I**

**HOURLY RATES**

3. The experience and background of the attorneys involved are, of course, relevant to the hourly rate to be

awarded. The Court should therefore be aware of the following facts:

a. I was graduated from Harvard Law School in 1974. From 1974 to 1975 I was the law clerk to the Hon. Edward J. Schwartz, Chief Judge of the United States District Court, Southern District of California. In 1975 I opened my own practice, along with Roy B. Cazares (and two other persons) and since that time, have been associated with Mr. Cazares, either as full-time partner or as of-counsel.

b. I have, since 1976, associated myself with Mr. Cazares only on civil rights cases. As Mr. Cazares' affidavit described, we have been reasonably successful in representing diverse clients with difficult and sophisticated claims.

c. In 1976 I began teaching law first in San Diego and then, beginning in the fall, 1978, at the UCLA School of Law. I teach one of only a handful of courses in this country devoted exclusively to civil rights legislation, and also teach a civil rights litigation seminar. In addition to my teaching responsibilities at UCLA, I have often been invited by groups throughout the state to lecture on civil rights litigation, particularly § 1983 claims.

4. It is submitted that the \$125.00 per hour request I am making in this case is reasonable for the following reasons: (a) I have concentrated on civil rights litigation since I finished my judicial clerkship in 1975, thereby making me more experienced, more efficient and, hopefully, more effective than others who litigate such claims (b) the "going rate" in Los Angeles for an attorney with



my experience and background ranges between \$125.00 and \$150.00 per hour.

## II

### HOURS EXPENDED

5. To date I have expended 1,265.50 hours on the prosecution of this case. This time can be generally described as having been expended in legal research of often novel yet necessary theories, in preparation of pleadings and motion papers, in discovery, in opposing motions to dismiss and motions for summary judgment, in interviewing plaintiffs and witnesses, in answering interrogatories, in analyzing police reports, in compelling unanswered or improperly objected interrogatories and requests for production, in preparing for depositions, in summarizing depositions and reviewing deposition summaries, in preparing the pre-trial order and memoranda of contentions of fact and law, in outlining questions for witnesses at trial, in preparing instructions, in other trial preparation in conference with plaintiffs and co-counsel, and in reviewing and analyzing responses in discovery.

6. The primary reason that the number of hours expended is large is because of the breadth and complexity of the case. As this Court is well aware, both the state of the law and the state of the facts as of 1975 and 1976 required innovative lawyering and investigating; there was no blueprint for this case when he brought these claims.

7. A secondary reason that this case involved many hours of labor was the litigious nature of defendants. We do not desire to belabor the point, but it is not unim-



portant that access to obviously relevant discovery was blockaded at every turn; that legal issues were often and persistently misinterpreted and misconstrued; that objections to discovery, exhibits and witnesses were often at best tenuous, even incomprehensible. It also merits this Court's attention that a group of defendants (granted Summary Judgment by Judge Ferguson) and their counsel found it appropriate to file a malicious prosecution complaint against both our clients and ourselves (sic) in the Riverside Superior Court. Only extraordinary effort to remove the case to federal court—where it was dismissed by Judge Ferguson—avoided the burden of defending that allegedly good faith claim at the same time plaintiffs were prosecuting this action. Finally, and perhaps the best evidence of the litigious nature of defendants, the number of hours expended is great because defendants never once made a reasonable settlement offer. Trial, as this Court is aware, was necessary to vindicate our clients rights.

### III

#### ADJUSTMENTS TO HOURLY RATES

8. A multiplier or "bonus" award should be afforded above the normal hourly billing rates. As both the accompanying Memorandum of Law and affidavit of Mr. Cazares explain, such a multiplier is not only appropriate, but perhaps paradigmatically so if citizens are to continue to value the rights of the national community. It is not difficult to imagine that absent such bonuses fewer and fewer attorneys willing to risk a good portion of their professional lives on difficult *and* highly contingent claims.

## IV

## CONCLUSION

9. Based on the facts and points outlined above as well as in the other affidavits and in the brief submitted herein, it is submitted that the amount of time expended on this case is reasonable, that the hourly rates requested are reasonable, that a multiplier or bonus is appropriate in this case, and that therefore this Court should make an award herein of \$495,713.51.

/s/ Gerald P. Lopez

SUBSCRIBED AND SWORN TO before  
me this 1 day of December, 1980.

/s/ Marianne V. Roiz  
Notary Public in and for said  
County and State

Official Seal  
Marianne V. Roiz  
Notary Public, California  
My Commission Exp. July 18, 1982

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(Caption omitted in printing)

No. CV 76-1803-MRP

AFFIDAVIT OF ROY B. CAZARES  
RE: REQUEST FOR ATTORNEYS FEES

ROY B. CAZARES, being duly sworn, deposes and  
says:

1. I am co-counsel for the plaintiffs in the above-captioned action. I make this affidavit in order to bring

certain facts to the Court's attention which are relevant to the amount of attorney's fees requested in plaintiff's application for attorney's fees.

2. Initially, it should be stated that during the settlement conference on August 31, 1979, this Honroable (sic) Court informed Counsel for Defendants that the case was complex and that plaintiffs were fully entitled to legal representation. This Court directed defendant's attorney to consider the substantial exposure of defendants to attorney fees alone, and advised counsel to consider said exposure in discussing settlement. Attorney for defendants returned to the settlement conference and repeated his principal's position that they would not offer more than \$10,000.00 in full settlement of all claims including attorney fees. This offer to settle all claims including attorney fees was made after five years of extensive pre-trial discovery and litigation. Counsel for defendants knew or should have known that expenses alone nearly totalled \$7,000.00.

3. The memorandum of law filed concurrently with this affidavit shows that in determining the amount of the fees to be awarded, the usual practice is for the Court first to determine the normal hourly rates charged and the number of hours expended on the case and then to calculate a base figure based on hourly rates times number of hours expended. The next step then is to make adjustments from the base figure based on such factors as the contingent nature of the receipt of fees and the result obtained for the represented plaintiffs. With this in mind, the remainder of this affidavit is divided into four sections, as follows: The Attorneys' Hourly Rates;

The Number of Hours Expended; The Appropriate Adjustments To The Normal Rates; and the Conclusion.

## I

### HOURLY RATES

4. The experience and background of the attorneys involved is relevant to the hourly rate to be awarded. Therefore, affiant respectfully invites the Court's attention to the following facts:

a. I graduated from San Diego State College with honors and with distinction in 1970, I graduated from Harvard Law School in 1973. Between July of 1973 and May of 1975, I was employed as a staff trial attorney with the Defenders Program of San Diego County. As a trial attorney with the Defenders Program, I was responsible for all phases of litigation in criminal defense for indigents. I handled virtually every single type of offender and represented clients in various forums such as the Municipal Court, Superior Court, Court of Appeals, Juvenile Court, Family Law Court, Mental Health Court, Parole Hearings, California Rehabilitation Center Exclusion Hearings, Mentally Disordered Sex Offender Hearings, Civil Addict Program Hearings and Welfare Board Hearings. I was solely responsible for all phases of the cases from initial bail reviews to exhaustion of appellate relief. I prepared and argued numerous pre-trial motions, extraordinary writs, appeals and motions for past conviction relief. I handled in excess of five hundred criminal cases of which many went to jury trial in the Superior Court.

b. In May of 1975, I started private practice with the firm of Jones, Cazares, Adler and Lopez. The firm handled a general practice with a strong emphasis on civil rights and representation of low income clients. Since entering private practice I have been involved in cases such as the following: *Aleman v. Alvarado, Laborers Local 89*, Civil Case No. 76-407-T, S.D. Cal. The "Local 89" case arose out of complaints made to affiant that union leaders were mishandling various pension funds. Affiant obtained the cooperation of the United States Attorney in prosecuting union leaders while plaintiffs sought civil relief. Ultimately seventeen union officers or ex-officials were convicted and ordered to pay restitution to the union.

*United States of America, Chicano Federation, et al., v. San Diego County, et al.*, Civil Case No. 76-1094-S, S.D. Cal. As attorney for plaintiff Chicano Federation of San Diego County, Inc., a party plaintiff, I was directly responsible for the implementation of a five year consent decree that provides broad based relief for Chicanos, women, blacks and Pan-Asians who have suffered the effects of past employment discrimination in County hiring, promotion, training and transfer policies. I have been involved in challenging hiring tests in terms of reliability and validity. I obtained an injunction against the County Board of Supervisors to prevent them from circumventing the Consent Decree and I have assisted in analysis of progress towards meeting interim goals in the Decree.

*Lisa Martine Pliscou by her Guardian Ad Litem, Norm Pliscou v. Holtville Unified School District*, Civil Case No. 75-0926-GT. Our firm represented a young high school student in protecting her rights guaranteed under

the First Amendment to the Constitution. We were the prevailing party.

*The People of the State of California v. Federico Frank, Patricia Zerda Zerda, et al.*, Crim No. 39862, Superior Court, San Diego County. I represented Patricia Zerda Zerda in a multiple defendant murder trial that lasted approximately five months. It was the longest murder trial in the history of San Diego County at the time and involved unique legal issues. The case involved Colombian and Swiss nationals arrested in the Republic of Mexico for a homicide committed in San Diego. The Court specifically requested that I participate in the defense.

*Berry, et al., v. City of San Diego.* This was a Title VII class action in which we represented the discriminatory hiring practices of the San Diego Police Department and defendant City of San Diego. Six of the eight named plaintiffs were reinstated with back pay and broad based relief for the class was insured by a consent decree entered into by the parties.

In addition to approximately seventy five actual trials in the state courts, I have been retained to try various cases in the Federal District Court. As a litigation specialist I have also represented clients before a variety of other hearings such as formal labor arbitrations (I've won 12 out of 15 arbitrations), Department of Motor Vehicle Hearings, Insurance Arbitration Hearing, National Labor Relations Board Hearings, U.S. Customs Hearings, Immigration and Naturalization Service Hearings on deportations and exclusions, Social Security Administration Hearings, Administrative Law Hearings re: Longshoremen and Harbor Workers' Act, California Labor Commis-



sion Hearings, California OSHA Hearings and U.S. Department of Labor Hearings.

c. I have received awards and certificates of appreciation from the following:

Cabrillo Foundation, award for outstanding community services; San Diego Legal Aid Society for service to the Board of Directors,

1979 Joint California State Legislature Resolution For Outstanding Leadership in the area (sic) of Civil Rights,

San Diego County Fiscal and Justice Planning Agency for service to the Board of Advisors,

La Raza Lawyers Association for service as first President of the Association.

I have served on various boards and commissions such as:

Commission of the Californias

Legal Aid Society

National Conference of Christians and Jews

California Rural Legal Assistance, Inc.

San Diego County Fiscal and Justice Board

Chicano Federation, Justice Committee

Alba 80 Society (Scholarship Foundation)

Sweetwater Unified School District

Title I Advisory Committee

Chicano Free Clinic Board



d. In addition to practicing law, I have taught Police Community Relations at Southwestern College and Civil Rights, Constitutional Law and Immigration Law and Practice at San Diego State University. I have lectured to attorney groups on international law between Mexico and the United States and have consulted with other attorneys on how to litigate immigration, personal injury and civil rights cases. I have lectured to the Association of Mexican American Educators, California Association of Bilingual Educators, the San Diego Policy Academy, San Diego City Schools, San Diego County Schools and a number of college university, and high school classes.

5. It is submitted that the \$125.00 per hour request I am making in this case is reasonable because:

a. In the five years since I started working on this case, inflationary pressures have caused a rise in the normal hourly rate charged by attorneys.

b. I have extensive litigation experience over a broad range of legal issues and I am therefore considered more experienced than most attorneys with seven years in practice.

c. The issues in the case were complex and probably beyond the expertise of lawyers with less experience.

d. The normal rate for complex litigation in Los Angeles is \$150.00 per hour.

## II

### HOURS EXPENDED

6. To date I have expended 681.25 hours in the preparation and and (sic) prosecution of this case. In gen-

eral, I have spent much of the time in discovery, depositions, witness interviews, legal research, answering interrogatories, investigation, preparation for pretrial conferences, reviewing extensive police reports, preparing for trial and trial. I have made numerous trips to Los Angeles and Riverside to prepare for trial. The law of the case changed frequently and dramatically during the pre-trial stages, thus necessitating expanding discovery to conform to emerging doctrines.

Plaintiffs in this case could not retain local counsel to represent them because of the highly politicized background of the case. Two weeks after the incident giving rise to this lawsuit, Chicanos from Casa Blanca openly rebelled against perceived police abuses against them. Several police officers and civilians were injured and property damage was high. The Casa Blanca incidents received national press and the Program 60 Minutes did a series on police community problems in Riverside. Your affiant and his law partners accepted the case because we felt it had great merit and because it was our opinion that the plaintiffs would go unrepresented if they had to rely on local attorneys (sic). Therefore, of necessity, the case was such that it required many hours of travel time both to the site of the incident and to the Federal Court in Los Angeles.

Attached hereto is exhibit A which describes the activity engaged in by affiant during the time billed.

7. I have reviewed the following records of hours expended by law clerks Julie Davis and Mark Crowley and the hours expended (sic) appear to be reasonable:

*Julie Davis:*

|                    |          |       |
|--------------------|----------|-------|
| September 20, 1980 | Research | 5.00  |
| September 22, 1980 | Research | 4.00  |
| September 23, 1980 | Research | 2.00  |
| October 14, 1980   | Research | 2.00  |
| October 17, 1980   | Research | 4.00  |
| November 7, 1980   | Research | 5.00  |
| November 8, 1980   | Research | 7.00  |
| November 10, 1980  | Research | 5.00  |
| November 12, 1980  | Research | 1.00  |
| November 14, 1980  | Research | 3.00  |
| November 19, 1980  | Research | 1.50  |
| November 23, 1980  | Motion   | 4.00  |
|                    | <hr/>    |       |
|                    | Total    | 43.50 |

43.50 X \$25.00= \$1,087.50

*Mark Crowley:*

|                |                                                                           |       |
|----------------|---------------------------------------------------------------------------|-------|
| June 13, 1979  | Witness<br>interviews<br>(Riverside)                                      | 6.00  |
| June 14, 1979  | Witness<br>interviews<br>(Riverside)                                      | 6.00  |
| March 10, 1980 | Reviewed<br>Discovery                                                     | 5.50  |
| March 11, 1980 | Reviewed<br>Discovery                                                     | 5.50  |
| March 12, 1980 | Trial<br>preparation                                                      | 6.00  |
| March 17, 1980 | Traveled with<br>Mr. Cazares to<br>Riverside to<br>Interview<br>witnesses | 10.00 |
| March 18, 1980 | Helped to<br>collate<br>discovery                                         | 2.00  |
|                | <hr/>                                                                     |       |
|                | Total                                                                     | 41.00 |

41 hours X \$25.00= \$1,025.00

Julie Davis is a third year law student at UCLA School of Law. Mark Crowley is a recent admittee to the Bar.

|                                            |            |
|--------------------------------------------|------------|
| Total paralegal/law<br>clerk time expended | \$2,112.50 |
|--------------------------------------------|------------|

#### IV

#### ADJUSTMENTS TO HOURLY RATES

8. A multiplier or "bonus" award should be afforded in this case above the normal hourly billing rates. The multiplier which plaintiffs seek in this case is 2.00 times the hourly rates for attorneys. We ask that this multiplier be applied only to the normal billing rates of Messrs. Cazares and Lopez; we do not ask that the multiplier be applied to the law clerk and paralegal rates. For Messrs. Cazares and Lopez, the total fees requested total \$244,781.25. When the multiplier of 2.00 is applied to this figure, the total is \$489,562.50. In turn, when to this figure is added the charges for the paralegal and law clerk time, and the disbursements our total fee request amounts to \$495,713.51.

9. There are several reasons that a "multiplier" or bonus award is appropriate in the instant case. The law on the point is fully discussed in the "Plaintiffs' Memorandum of Points and Authorities In Support of Motion For Attorneys' Fees", submitted concurrently with this affidavit.

10. Plaintiffs believe that the principle reason that a multiplier award should be made in this case is because it would encourage other attorneys to represent low income plaintiffs in important civil rights cases on a contingent fee basis. It is only fair and reasonable that attorneys willing to assume these type of cases be reimbursed in such a fashion that insures that lawyers will be willing to represent even those who cannot afford to pay or to advance

costs. Plaintiffs believe that the vindication of constitutional rights is equally as important as the protection afforded the free market economy by successful antitrust litigants. Many attorneys will only protect the poor or the unpopular against constitutional deprivations if they can feel reasonably assured that their commitment to that cause will be recognized as a service to the community as well as the litigants. The poor, the unpopular and those lacking in power have the same rights to preserve their dignity as everyone else. To the extent that courts encourage the protection of their constitutional rights, society in general is served.

DATED: 12/1/80

Respectfully submitted,

/s/ Roy B. Cazares

SUBSCRIBED AND SWORN TO before me  
this 1 day of December, 1980.

/s/ Marianne N. Roiz

Notary Public in and for said  
County and State

Official Seal

MARIANNE N. ROIZ  
Notary Public—California  
My Commission Expires July 18, 1982

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#### HOURS SUBMITTED BY ROY B. CAZARES

|         |                                                                                                                                                                                 |       |
|---------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| 8/21/75 | Travel to Riverside to conduct preliminary interviews of potential plaintiffs and approximately ten witnesses, took photographs of area and conducted preliminary investigation | 13.00 |
| 8/25/75 | Conference with Jerry Lopez re: results of trip to Riverside, potential causes of action                                                                                        | 2.00  |

|          |                                                                                                   |      |
|----------|---------------------------------------------------------------------------------------------------|------|
| 9/22/75  | Conference with Jerry Lopez re: research into individual and municipal liability                  | 2.50 |
| 9/30/75  | Conference with Lopez re: theories of liability and what plaintiffs we are going to represent     | 1.50 |
| 10/ 3/75 | Meeting with clients in our offices regarding representation and facts of incident                | 2.50 |
| 10/23/75 | Worked on 100 day demands re: exhaustion of administrative remedies                               | 1.00 |
| 10/23/75 | Meeting with Manuel Flores, Jr. and Jerry Rivera re: progress of case and new witnesses           | 2.00 |
| 10/25/75 | Travel to Riverside to file 100 day demands, investigation, witness interviews (with Jerry Lopez) | 8.50 |
| 11/20/75 | Conference with J. Lopez re: Riverside                                                            | 1.50 |
| 11/21/75 | Conference with clients                                                                           | 3.50 |
| 11/25/75 | Conference with Jerry Lopez                                                                       | 1.00 |
| 12/15/75 | Conference with Jerry Lopez re: Riverside claims for damages                                      | 1.50 |
| 1/14/76  | Conference with Jerry Lopez re: difficulty (sic) in identifying defendants and John Doe pleading  | 1.00 |
| 1/28/76  | Conference with Jerry Lopez re: Insurance company request for indemnity                           | .45  |
| 2/18/76  | Worked with Jerry Lopez on cause of action against City of Riverside                              | 1.50 |
| 3/19/76  | Meeting with Jerry Lopez re: pendant claims and damages                                           | 2.00 |



|          |                                                                                                                                   |      |
|----------|-----------------------------------------------------------------------------------------------------------------------------------|------|
| 3/29/76  | Conference with Jerry Lopez and Napoleon Jones re: elements of proof of psychological damages for Donald Rivera and Mark Larrabee | 1.50 |
| 4/ 9/76  | Meeting with Jerry Rivera                                                                                                         | 1.00 |
| 4/29/76  | Meeting and research into statutory immunity and basis for injunctive relief                                                      | 2.50 |
| 5/19/76  | Reviewed draft of complaint                                                                                                       | 1.50 |
| 6/16/76  | Conference re: discovery, interrogatories or depositions                                                                          | 1.00 |
| 7/ 2/76  | Reviewed answer to complaint; conference with Jerry Lopez                                                                         | 1.00 |
| 7/15/76  | Reviewed complaint No. 76-1901 re: plaintiffs                                                                                     | .75  |
| 8/24/76  | Conference with Jerry Lopez re: discovery of police files and manuals                                                             | 1.50 |
| 9/17/76  | Reviewed cross-examination notes of attorneys made during criminal prosecution                                                    | 2.00 |
| 9/24/76  | Reviewed a series of police reports re: incident                                                                                  | 1.50 |
| 10/15/76 | Conference with Jerry Lopez re: disposition scheduling                                                                            | 1.50 |
| 10/17/76 | Conference with Jerry Lopez and Samuel Paz, attorney for co-plaintiff re: discovery, dispositions                                 | 2.50 |
| 12/13/76 | Reviewed witness statements                                                                                                       | 2.75 |
| 12/14/76 | Meeting with Jerry Lopez re: depositions                                                                                          | 1.50 |
| 12/15/76 | Travel to Riverside Preparation of plaintiffs for depositions                                                                     | 7.00 |
| 12/16/76 | Depositions of Jerome Rivera, Jennie Rivera, Lee Roy Rivera, Donald Rivera                                                        | 8.00 |



|         |                                                                                                                                                                                                 |      |
|---------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 1/ 6/77 | Conference with Lopez re: deposition                                                                                                                                                            | 2.00 |
| 1/10/77 | Preparation for the depositions of Sgt. L.L. Richardson, Officer Gerald Miller, Officer Joachim Palm, Officer Robert Plait, Officer Kenneth Qualls, Sgt. Michael Watts, 5:00 p.m. to 11:30 p.m. | 6.50 |
| 1/10/77 | Read motion to dismiss City                                                                                                                                                                     | 1.25 |
| 1/11/77 | Travel to Los Angeles for depositions<br>Depositions of: Sgt. L.L. Richardson, Officer Gerald Miller, Officer Joachim Palm, Officer Robert Plait, 10:00 a.m. to 4:00 p.m.                       | 5.00 |
| 1/12/77 | 7:00 a.m. to 9:30 a.m. preparation for depositions<br>Depositions of: Sgt. Michael Watts, Officer Kenneth Qualls, 10:00 a.m. to 1:45 p.m.                                                       | 3.75 |
|         | Conference with attorney Samuel Paz                                                                                                                                                             | 1.75 |
|         | Travel from Los Angeles to San Diego                                                                                                                                                            | 2.45 |
| 1/13/77 | Conference with Jerry Lopez, re: defendant depositions                                                                                                                                          | 1.00 |
| 1/28/77 | Proof read motion in opposition to dismiss City                                                                                                                                                 | 1.00 |
| 2/ 1/77 | Correspondence from Jennie Rivera                                                                                                                                                               | .20  |
| 2/ 7/77 | Reviewed defendants motion to dismiss                                                                                                                                                           | 2.00 |
| 2/11/77 | Received correspondence from Lee Roy Rivera including medical history                                                                                                                           | 1.00 |
| 2/15/77 | Conference re: defendants interrogatories                                                                                                                                                       | 1.50 |
| 3/ 3/77 | Read draft of opposition to individual motions to dismiss                                                                                                                                       | 1.00 |
| 3/15/77 | Reviewed defendants reply to our opposition to motion to dismiss                                                                                                                                | .75  |
| 3/25/77 | Reviewed correspondence and stipulation                                                                                                                                                         | .25  |

|         |                                                                                                                 |      |
|---------|-----------------------------------------------------------------------------------------------------------------|------|
| 3/25/77 | Read individual defendants reply to our opposition to motion to dismiss                                         | 1.00 |
| 3/29/77 | Correspondence from Kotler re: plaintiffs responses to interrogatories                                          | .50  |
| 4/11/77 | Reviewed defendants second set of interrogatories consisting of 414 questions                                   | 3.50 |
| 4/15/77 | Read defendants to require further answers to interrogatories; reviewed answers to first set of interrogatories | 1.50 |
| 4/18/77 | Conference re: defendants discovery tactics and oppressive interrogatories                                      | .50  |
| 5/ 6/77 | Read plaintiffs points and authorities in opposition to defendants motion to compel further answers             | 1.00 |
| 5/11/77 | Reviewed defendants opposition to plaintiffs motion for protective order                                        | .75  |
| 7/ 6/77 | Worked on plaintiffs responses to interrogatories                                                               | 3.00 |
| 7/ 7/77 | Worked on plaintiffs answers to defendants interrogatories                                                      | 3.00 |
| 7/22/77 | Read defendants memorandum in opposition to plaintiffs motion to compel                                         | 1.00 |
| 8/ 5/77 | Read defendants answers to plaintiffs interrogatories (2nd set)                                                 | 2.00 |
| 8/ 5/77 | Reviewed defendants motion for summary judgment                                                                 | 1.75 |
| 8/19/77 | Conference with Jerry Lopez re: summary judgment                                                                | 1.00 |
| 9/ 7/77 | Reviewed draft of opposition to defendants motion for summary judgment                                          | 1.00 |
| 9/19/77 | Review of draft of Supplemental Points and Authorities in Opposition to Defendants Motion for Summary Judgment  | 1.00 |

|          |                                                                                                                                                                              |       |
|----------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| 9/22/77  | City of Riverside's opposition to motion to compel                                                                                                                           | 1.00  |
| 9/29/77  | Conference with Jerry Lopez re: all motions and interrogatories, case review                                                                                                 | 3.00  |
| 10/ 3/77 | Prepared correspondence to clients re: authorizations for release of medical information                                                                                     | 1.00  |
| 11/ 7/77 | Reviewed defendants motion to compel further answers                                                                                                                         | .75   |
| 12/ 8/77 | Reviewed draft opposition to defendant's motion to compel                                                                                                                    | .75   |
| 1/24/78  | Review of defendants taxing of costs on summary judgment                                                                                                                     | .50   |
| 1/26/78  | Conference with Jerry Lopez re: taxing of costs                                                                                                                              | 1.00  |
| 2/ 3/78  | Witness interview in Riverside and travel 8:00 a.m. to 5:00 p.m.                                                                                                             | 10.00 |
| 2/ 9/78  | Conference with Jerry Lopez re: expert testimony                                                                                                                             | 1.00  |
| 2/27/78  | Review of extensive medical records of Manuel Flores, Jr. in preparation for deposition of Harlan H. Omlid, M.D., review of doctor/patient privileged 6:00 p.m. to 9:45 p.m. | 3.75  |
|          | Conference with Jerry Lopez                                                                                                                                                  | 1.00  |
| 2/28/78  | Travel to Fontana, Ca for deposition Deposition of Harlan H. Omlid, M.D. 2:00 p.m. to 3:00 p.m.                                                                              | 1.50  |
|          | Travel from Fontana to San Diego                                                                                                                                             | 2.50  |
| 3/ 1/78  | Preparation for deposition 10:30 a.m. to 12:00 p.m.                                                                                                                          | 1.50  |
|          | Travel from San Diego to San Bernardino 12:00 p.m. to 2:00 p.m.                                                                                                              | 2.00  |

|         |                                                                                                                                         |      |
|---------|-----------------------------------------------------------------------------------------------------------------------------------------|------|
|         | Deposition of Donald J. Feldman, M.D.<br>2:00 to 3:30 p.m.                                                                              | 1.50 |
|         | Return to San Diego                                                                                                                     | 2.00 |
| 4/ 7/78 | Review of further answers submitted<br>by City on motion to compel                                                                      | 2.00 |
| 4/19/78 | Conference with Jerry Lopez re: dis-<br>covery against City to establish prac-<br>tice or policy                                        | 1.00 |
| 4/21/78 | Conversation with Kotler and follow-<br>up correspondence re: stipulation                                                               | .50  |
| 5/ 3/78 | Served by San Diego County Sheriff<br>with complaint for malicious prosecu-<br>tion, review of complaint                                | 1.00 |
| 5/ 3/78 | Conference (telephone) with co-defend-<br>ant Jerry Lopez on malicious prosecu-<br>tion and re: cross-complaint for abuse<br>of process | .50  |
| 5/ 4/78 | Correspondence to Kotler re: discovery                                                                                                  | .50  |
| 5/15/78 | Conference with Jerry Lopez re: re-<br>moval of case, malicious prosecution, to<br>federal court                                        | 2.00 |
| 5/16/78 | Review of petition for removal and sup-<br>porting affidavit                                                                            | 1.00 |
| 5/15/78 | Review motion to dismiss and motion<br>for summary judgment                                                                             | 1.00 |
| 6/ 6/78 | Review of motion by defendant to re-<br>mand to Superior Court                                                                          | .75  |
| 6/16/78 | Review to our motion for summary<br>judgment                                                                                            | 1.75 |
| 7/ 6/78 | Reviewed defendants response to our<br>opposition to defendants motion to re-<br>mand                                                   | .75  |
| 7/18/78 | Reviewed individual and City's answers<br>to interrogatories                                                                            | 1.50 |

|          |                                                                                           |      |
|----------|-------------------------------------------------------------------------------------------|------|
| 7/19/78  | Reviewed answers to interrogatories                                                       | 1.50 |
| 8/ 2/78  | Drafted notice of deposition                                                              | .25  |
| 8/10/78  | Conference with Jerry Lopez re: discovery                                                 | 2.00 |
| 8/28/78  | Preparation for deposition 4:00 p.m. to 5:30 p.m.                                         | 1.50 |
| 8/29, 78 | Travel from San Diego to Riverside                                                        | 2.15 |
|          | Deposition of Officer Jan E. Olson 10:30 a.m. to 12:00                                    | 1.50 |
|          | Travel from Riverside to San Diego 1:00 p.m. to 3:30 p.m.                                 | 2.50 |
| 9/ 6, 78 | Reviewed Casa Blanca Operational Plan                                                     | 1.75 |
| 9/18, 78 | Review Kotler letter re: pre-trial conference, conservation with co-counsel               | .25  |
| 9/19, 78 | Cover letter and notice of deposition of Eltringham, Webster, Innskeep                    | .50  |
| 9/20, 78 | Review of letter and stipulation from Kotler                                              | .25  |
| 10/ 4/78 | Preparation for deposition of Officer Donald B. Eltringham, 1:00 p.m. to 2:30 p.m.        | 1.50 |
| 10/ 5/78 | Travel to Riverside from San Diego, 8:00 to 10:00 a.m.                                    | 2.00 |
|          | Deposition of Officer Donald Eltringham 10:30 a.m. to 11:45 a.m.                          | 1.25 |
|          | Return to San Diego                                                                       | 2.20 |
| 10/ 6/78 | Review of Kotler's correspondence re: deposition of Ferguson, conference with Jerry Lopez | .50  |
| 10/10/78 | Drafted correspondence to Kotler re: deposition and pretrial conference                   | 1.00 |
| 10/13/78 | Reviewed correspondence from Kotler re: depositions and pre-trial conference              | .50  |

|          |                                                                                                                                                                                                                                                                                                                                                                                                                       |                                              |
|----------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------|
| 10/18/78 | Correspondence to Kotler                                                                                                                                                                                                                                                                                                                                                                                              | .75                                          |
| 11/ 8/78 | Correspondence to Kotler re: cancelled depositions and in response to his letter                                                                                                                                                                                                                                                                                                                                      | .50                                          |
| 11/13/78 | Conversation with Kotler re: stipulation                                                                                                                                                                                                                                                                                                                                                                              | .25                                          |
| 11/28/78 | Set up deposition in Salinas                                                                                                                                                                                                                                                                                                                                                                                          | .25                                          |
| 11/28/78 | Letter to Kotler re: site and time of Ferguson's deposition in Salinas                                                                                                                                                                                                                                                                                                                                                | .25                                          |
| 12/ 3/79 | Correspondence to all plaintiffs re: 3/25/80 trial date                                                                                                                                                                                                                                                                                                                                                               | .75                                          |
| 12/11/78 | Conference with Jerry Lopez                                                                                                                                                                                                                                                                                                                                                                                           | .50                                          |
| 12/11/78 | Preparation for the depositions of Deputy District Attorneys Daniel Webster, Donald Innskeep and Detective Michael Smith 3:00 p.m. to 4:30 p.m.<br>5:00 p.m. to 7:00 p.m.                                                                                                                                                                                                                                             | 1.50<br>2.00                                 |
| 12/12/78 | Travel from San Diego to Riverside 7:30 a.m. to 10:00 a.m.<br>Deposition of Detective Michael Smith 10:00 a.m. to 11:45 a.m.<br>Deposition of Deputy District Attorney Daniel Webster 1:30 p.m. to 2:30 p.m.<br>Deposition of Deputy District Attorney Donald Innskeep, 2:30 p.m. to 3:30 p.m.<br>Conference with Jennie Rivera, 4:00 p.m. to 6:00 p.m.<br>Travel from Riverside to San Diego, 6:00 p.m. to 8:15 p.m. | 2.50<br>1.75<br>1.00<br>1.00<br>2.00<br>2.25 |
| 12/18/78 | Preparation for deposition of Thomas Blanshard, M.D., 8:30 a.m. to 9:30 a.m.                                                                                                                                                                                                                                                                                                                                          | 1.00                                         |
| 12/19/78 | Travel from San Diego to Fontana, CA 7:30 a.m. to 10:00 a.m.<br>Deposition of Dr. Blanchard, 10:30 to 11:30 a.m.                                                                                                                                                                                                                                                                                                      | 2.50<br>1.00                                 |



|          |                                                                                                       |      |
|----------|-------------------------------------------------------------------------------------------------------|------|
|          | Conference with Jennie Rivera 12:00 p.m. to 1:00 p.m.                                                 | 1.00 |
|          | Travel from Riverside to San Diego 1:00 to 3:00 p.m.                                                  | 2.00 |
| 12/26/78 | Letter to Kotler re: Jerry Rivera                                                                     | .25  |
| 12/28/78 | Preparation for deposition for Chief Ferguson 4:30 p.m. to 7:00 p.m.                                  | 2.50 |
|          | Travel to Salinas, CA, from San Diego via Monterrey Ca, 6:30 to 11:00                                 | 4.50 |
|          | Deposition of Chief Ferguson 11:00 a.m. to 12:25 p.m.                                                 | 1.40 |
|          | Travel from Salinas to Monterrey to San Diego, 1:30 to 6:00 p.m.                                      | 4.50 |
| 1/18/79  | Received and reviewed defendants opposition to further continuances and demand for early trial date   | .75  |
| 1/22/79  | Pre-trial conference in Los Angeles, preparation and travel to and from Los Angeles                   | 5.75 |
| 2/ 1/79  | Conference with Jerry Lopez                                                                           | 1.50 |
| 2/ 1/79  | Travel from San Diego to Los Angeles for pretrial conference with Mr. Kotler, 7:30 a.m. to 10:00 a.m. | 2.50 |
|          | Pre-trial conference and exchange of exhibits, 10:00 a.m. to 11:45 a.m.                               | 1.75 |
|          | Travel from Los Angeles to San Diego 2:30 to 5:00 p.m.                                                | 2.50 |
| 2/ 8/79  | Proof read contentions of law and fact, signed                                                        | 2.75 |
| 2/26/79  | Preparation for pre-trial conference, pretrial conference, travel to and from Los Angeles             | 6.75 |
| 2/27/79  | Pretrial preparation, review of witness statements                                                    | 3.00 |
| 3/ 5/79  | Pretrial preparation and review of interrogatories                                                    | 2.00 |



|         |                                                                                             |      |
|---------|---------------------------------------------------------------------------------------------|------|
| 3/10/79 | Review of witness statements in preparation of trial                                        | 4.00 |
| 3/12/79 | Worked on amended pretrial order                                                            | 2.50 |
| 3/14/79 | Reviewed police reports                                                                     | 2.50 |
| 3/16/79 | Reviewed amended pretrial order                                                             | 1.00 |
| 3/19/79 | Worked on amendment to pretrial order                                                       | 1.00 |
| 3/20/79 | Read, drafted supplemental memorandum of law                                                | 1.00 |
| 3/24/79 | Worked on trial preparation re: direct examination of plaintiff's witnesses                 | 3.00 |
| 3/28/79 | Drafted affidavit in opposition to defendant's motion to exclude evidence                   | 2.00 |
| 3/29/79 | Correspondence to Clerk, U.S. District Court re: subpoenas                                  | .30  |
| 4/ 2/79 | Received and reviewed defendants response to plaintiffs supplemental memorandum of law      | .75  |
| 4/ 3/79 | Letter to clerk re: subpoena                                                                | .25  |
| 4/ 3/79 | Correspondence to Mr. & Mrs. Larrabee re: trial date of April 17, 1979                      | .25  |
| 4/ 9/79 | Preparation for, travel to, pretrial conference and conference                              | 6.75 |
| 4/16/79 | Preparation for pretrial conference, travel to and from Los Angeles for pretrial conference | 5.30 |
|         | Pretrial conference with attorney Kotler to exchange exhibits and to work out stipulations  | 2.50 |
| 4/27/79 | Preparation of plaintiffs Second Supplemental Memorandum of law, 9:00 a.m. to 3:00 p.m.     | 5.00 |
| 5/12/79 | Cross-referenced original witness statements with subsequent interviews,                    |      |

|         |                                                                                                                                    |      |
|---------|------------------------------------------------------------------------------------------------------------------------------------|------|
|         | selected witness, review approximately 400 pages of notes of interviews                                                            | 6.00 |
| 5/15/79 | Received and reviewed defendants response to plaintiffs Second Supplemental Memorandum of law                                      | .50  |
| 5/21/79 | Received and reviewed defendants motion to dismiss for failure to prosecute and supporting affidavit                               | 1.00 |
| 6/ 4/79 | Preparation of proposed stipulations and modified exhibit list                                                                     | 2.00 |
| 6/ 7/79 | Correspondence to court                                                                                                            | .25  |
| 6/13/79 | Travel to Riverside with Mark Crowley for interviews with witnesses                                                                | 6.00 |
| 6/14/79 | Witness interviews in Riverside and return to San Diego                                                                            | 6.00 |
| 6/15/79 | Preparation of opposition to defendants motion to dismiss for lack of prosecution, 2:00 p.m. to 5:00 p.m. Meeting with Jerry Lopez | 3.00 |
| 6/19/79 | Correspondence to Kotler re: requests for stipulations and exhibits                                                                | 1.00 |
|         | Correspondence to court                                                                                                            | .25  |
| 6/22/79 | Received and review defendants affidavit in response to plaintiffs affidavit opposing motion to dismiss for lack of prosecution    | .50  |
| 7/ 2/79 | Preparation for, travel to, and hearing on motion to dismiss for lack of prosecution                                               | 7.50 |
| 7/ 5/79 | Travel to Los Angeles, preparation of exhibits                                                                                     | 6.00 |
| 7/11/79 | Reviewed defendants objection to plaintiffs modified exhibit list                                                                  | 1.00 |

|          |                                                                                                                            |      |
|----------|----------------------------------------------------------------------------------------------------------------------------|------|
| 8/ 2/79  | Correspondence to all plaintiffs re: mandatory settlement conference on 8/31/79                                            | 1.25 |
| 8/23/79  | Reviewed file re: settlement                                                                                               | 2.00 |
| 8/31/79  | Preparation for settlement conference with plaintiffs present, travel to and from Los Angeles and settlement conference    | 6.50 |
| 10/19/79 | Conference (telephone) with Jerry Lopez re: settlement                                                                     | .50  |
| 10/22/79 | Travel to and from Los Angeles for settlement/status conference                                                            | 5.50 |
| 12/13/79 | Travel to Los Angeles for conference with Jerry Lopez, entire case review                                                  | 8.00 |
| 2/ 4/80  | Preparation for status conference, status conference, travel to and from Los Angeles; conference with Jerry Lopez          | 7.75 |
| 2/28/80  | Correspondence to Kotler re: supplemental pleadings                                                                        | .25  |
| 3/ 8/80  | Meeting with Jerry Lopez in Los Angeles re: trial preparation, travel to Los Angeles and return                            | 7.00 |
| 3/10/80  | Received and reviewed defendants memorandum of contentions of law and fact                                                 | 3.25 |
| 3/11/80  | Correspondence to all plaintiffs and witness re: meeting at Rivera residence and 3/25/80 trial date and schedule           | 1.25 |
| 3/15/80  | 9:00 a.m. to 5:00 p.m., trial preparation, preparation of subpoenas and proposed examination, review of Casa Blanca Report | 7.00 |
| 3/17/80  | Interview all witnesses and plaintiffs in preparation for trial, reviewed all depositions of plaintiffs and witness        |      |

|         |                                                                                                                                                                      |       |
|---------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
|         | statements, travel to and from River-<br>side                                                                                                                        | 10.50 |
| 3/18/80 | 3:00 p.m. to 7:30 p.m. trial preparation                                                                                                                             | 4.50  |
| 3/21/80 | Received minute order re-setting trial<br>to June 3, 1980.                                                                                                           | .15   |
|         | 2:00 p.m. to 7:00 p.m. trial preparation,<br>developed tentative order of proof, re-<br>viewed medical records and depositions<br>on Manuel Flores and Jerome Rivera | 5.00  |
| 3/21/80 | Received Minute Order continuing trial<br>date                                                                                                                       | .10   |
| 5/ 9/80 | Review of Police operating manuals re:<br>use of force and tear gas, review of<br>Casa Blanca Report                                                                 | 2.50  |
| 5/ 9/80 | Organized and reviewed medical<br>charts, psychiatric charts, 60 minute<br>transcript and stipulations re: dismis-<br>sal and discovery                              | 1.75  |
| 6/16/80 | Received and reviewed defendants' mo-<br>tion for trial date certain, memoran-<br>dum of points and authorities                                                      | .50   |
| 7/19/80 | Trial preparation: review old notes,<br>investigator reports, photo and ex-<br>hibits                                                                                | 5.00  |
| 7/26/80 | Trial preparation: reviewed defend-<br>ants memorandum of contentions of<br>law and fact and exhibits                                                                | 6.00  |
| 7/30/80 | Received Notice of Continuance of trial<br>date to 9/16/80                                                                                                           | .15   |
| 8/ 1/80 | Correspondence to all plaintiffs re:<br>new trial date of September 16, 1980                                                                                         | .75   |
| 8/28/80 | Received and review Ex Parte Motion<br>to continue oral arguments on appeal<br>in C.A. No. 78-3319; CV 78-2076                                                       | .25   |

|         |                                                                                                                                                                                                                                                                                                                                                                                                                                     |       |
|---------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| 9/ 6/80 | Review of answers to plaintiffs interrogatories, compared answers to answers (sic) to answers given in depositions, reviewed attorney Wallace Farrels trial notes re; crossexamination of defendant police officers during criminal trials, expanded on tentative cross-examination, reviewed police procedures manual, researched certification guidelines for use of tear gas under California Penal Code. 8:00 a.m. to 6:30 p.m. | 8.50  |
| 9/10/80 | 5:00 a.m. to 9:00 a.m. legal research in preparation for trial, read major cases cited in contentions of law. 1:00 p.m. to 4:00 p.m.                                                                                                                                                                                                                                                                                                | 7.00  |
| 9/11/80 | Trial preparation, review of plaintiffs contentions of law and fact, defendants contention of law and fact, reviewed complaint and prepared outline of elements of each cause of action and supporting evidence and corroborating witnesses, reviewed jury instructions re: burden of proof and elements of each cause of action as against each defendant 1:00 p.m. to 8:00 p.m.                                                   | 7.00  |
| 9/12/80 | 1:00 p.m. to 5:00 p.m. trial preparation, review of interrogatories answered by plaintiffs, compared to plaintiffs depositions, preparation of additional subpoenas, telephone conference with Lee Roy Rivera, witness coordinator                                                                                                                                                                                                  | 5.00  |
| 9/13/80 | 8:00 a.m. to 6:00 p.m., preparation of trial folder for each named plaintiff including City of Riverside and organization of cross-index to exhibits                                                                                                                                                                                                                                                                                | 10.00 |
| 9/14/80 | 9:00 a.m. to 5:00 p.m., preparation of exhibits, marking exhibits, preparation                                                                                                                                                                                                                                                                                                                                                      |       |

|         |                                                                                                                                                                         |      |
|---------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
|         | of outline of every police report obtained during discovery                                                                                                             | 8.00 |
| 9/15/80 | Travel to Los Angeles from San Diego                                                                                                                                    | 2.50 |
|         | Trial preparation 10:00 a.m. to 5:00 p.m.                                                                                                                               | 7.00 |
|         | Conference with Jerry Lopez, co-counsel, re: presentation of case and witnesses from 6:00 p.m. to 11:00 p.m., preparation of exhibits and opening statement             | 5.00 |
| 9/16/80 | 5:00 a.m. to 7:30 a.m. preparation for trial                                                                                                                            | 2.50 |
|         | 9:00 a.m. to 5:00 p.m. trial                                                                                                                                            | 7.50 |
|         | 7:00 to 10:00 p.m. trial preparation                                                                                                                                    | 3.00 |
|         | Received and reviewed proposed Voir Dire submitted by plaintiffs                                                                                                        | .20  |
| 9/17/80 | 5:00 a.m. to 7:30 a.m. preparation for trial, review of statements of plaintiffs witnesses, review of clients depositions.                                              | 2.50 |
| 9/17/80 | Trial from 9:00 a.m. to 5:00 p.m.                                                                                                                                       | 7.50 |
|         | Preparation for trial from 7:00 p.m. to 11:30 p.m., discussions with Jerry Lopez (co-Counsel) re: order of proof, elements of causes of action and potential dismissals | 4.50 |
| 9/18/80 | 5:00 a.m. to 7:30 a.m., trial preparation                                                                                                                               | 2.50 |
|         | Trial from 9:00 a.m. to 4:00 p.m.                                                                                                                                       | 6.50 |
|         | 7:00 p.m. to 11:00 p.m., review of police reports, inter-department communications, Riverside Police Department policy of batons, firearms, tear gas usage              | 4.00 |
| 9/19/80 | 5:00 a.m. to 7:30 a.m. preparation for trial, review of interrogatories re: Chief Ferguson                                                                              | 2.50 |
|         | Trial from 9:00 a.m. to 4:30 p.m.                                                                                                                                       | 7.00 |
|         | Travel from Los Angeles to San Diego                                                                                                                                    | 2.00 |



|         |                                                                                                                                                                                                                                                                                          |      |
|---------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 9/20/80 | Trial preparation, review of damages, review of police reports for purposes of cross-examination of defendant police officer 10:00 a.m. to 4:00 p.m.                                                                                                                                     | 6.00 |
| 9/22/80 | Travel from San Diego to Los Angeles                                                                                                                                                                                                                                                     | 2.00 |
|         | Trial time 9:00 to 5:00 p.m.                                                                                                                                                                                                                                                             | 7.50 |
| 9/23/80 | 5:00 a.m. to 7:30 a.m. trial preparation                                                                                                                                                                                                                                                 |      |
|         | review of depositions, review of interrogatories and preparation of cross-examination                                                                                                                                                                                                    | 2.50 |
|         | Trial 9:00 a.m. to 5:00 p.m.                                                                                                                                                                                                                                                             | 7.50 |
|         | 6:30 to 11:30 p.m., trial preparation                                                                                                                                                                                                                                                    | 5.00 |
| 9/24/80 | Trial preparation 5:00 a.m. to 7:30 a.m.                                                                                                                                                                                                                                                 | 2.50 |
|         | Trial time 9:00 a.m. to 5:00 p.m.                                                                                                                                                                                                                                                        | 7.50 |
|         | Trial preparation and review of rebuttal evidence, preparation of additional jury instruction re: tear gas as dangerous instrumentality, research into impropriety of dismissals of criminal charges predicated on Stipulations of probable cause for the court. 7:00 p.m. to 11:30 p.m. | 4.50 |
| 9/25/80 | 4:30 a.m. to 7:30 a.m., preparation of final arguments, preparation of rebuttal testimony                                                                                                                                                                                                | 3.00 |
|         | Trial from 9:00 a.m. to 3:30 p.m.                                                                                                                                                                                                                                                        | 5.50 |
|         | 7:00 p.m. to 11:00 p.m., preparation of final argument                                                                                                                                                                                                                                   | 4.00 |
| 9/26/80 | 4:00 a.m. to 8:30 a.m., review of trial notes, complaint and depositions in preparation for final argument                                                                                                                                                                               | 4.50 |
| 9/26/80 | 9:30 to 3:00 p.m. final argument and rebuttal, instruction to jury                                                                                                                                                                                                                       | 5.00 |
|         | Travel from Los Angeles to San Diego                                                                                                                                                                                                                                                     | 2.00 |
| 9/29/80 | Travel from San Diego to Los Angeles                                                                                                                                                                                                                                                     | 2.00 |
|         | Standby for jury deliberation 9:00 to 5:00 p.m.                                                                                                                                                                                                                                          | 7.00 |



|          |                                                                                         |       |
|----------|-----------------------------------------------------------------------------------------|-------|
| 9/30/80  | Standby for jury deliberations 9:00 a.m. to 5:00 p.m.                                   | 7.00  |
| 10/ 1/80 | Standby for jury deliberations 9:00 a.m. to 5:00 p.m.                                   | 7.00  |
| 10/ 2/80 | Standby for jury deliberations, responded to questions from jury 9:00 a.m. to 4:30 p.m. | 6.50  |
| 10/ 3/80 | Standby for jury deliberations from 9:00 a.m. to 5:00 p.m.                              | 7.00  |
|          | Travel from Los Angeles to San Diego                                                    | 2.00  |
| 10/ 6/80 | Travel from San Diego to Los Angeles                                                    | 2.00  |
|          | Standby for jury deliberations 9:00 a.m. to 5:00 p.m.                                   | 7.00  |
| 10/ 7/80 | 9:00 a.m. to 3:00 p.m. waiting time for verdicts and reading of verdicts                | 4.00  |
| 11/28/80 | Preparation of attorney fee request and affidavit                                       | 10.00 |

---

### HOURS SUBMITTED BY GERALD P. LOPEZ

1975

Aug. 4.50  
 Sept. 15.50  
 Oct. 21.50  
 Nov. 23.50  
 Dec. 4.00

1976

Jan. 20.00  
 Feb. 13.00  
 Mar. 23.00  
 Apr. 24.50  
 May 7.50  
 June 4.75  
 July 15.00  
 Aug. 14.50  
 Sept. 11.75  
 Oct. 13.50  
 Nov. 13.50  
 Dec. 21.50

## 1977

|       |       |
|-------|-------|
| Jan.  | 30.75 |
| Feb.  | 34.50 |
| Mar.  | 46.75 |
| Apr.  | 22.75 |
| May   | 14.00 |
| June  | 33.00 |
| July  | 37.25 |
| Aug.  | 30.25 |
| Sept. | 55.25 |
| Oct.  | 34.50 |
| Nov.  | 11.75 |
| Dec.  | 8.00  |

## 1978

|       |       |
|-------|-------|
| Jan.  | 27.25 |
| Feb.  | 16.50 |
| Mar.  | 23.00 |
| Apr.  | 15.50 |
| May   | 52.25 |
| June  | 16.75 |
| July  | 13.50 |
| Aug.  | 50.50 |
| Sept. | 20.00 |
| Oct.  | .25   |
| Nov.  | 6.00  |
| Dec.  | 18.50 |

## 1979

|       |       |
|-------|-------|
| Jan.  | 60.50 |
| Feb.  | 41.00 |
| Mar.  | 33.50 |
| Apr.  | 51.00 |
| May   | 20.00 |
| June  | 3.50  |
| July  | 6.50  |
| Aug.  | 0.00  |
| Sept. | 0.00  |
| Oct.  | 0.50  |
| Nov.  | 0.00  |
| Dec.  | 10.50 |

## 1980

|       |       |
|-------|-------|
| Jan.  | 0.00  |
| Feb.  | 8.00  |
| Mar.  | 29.25 |
| Apr.  | 7.00  |
| May   | 22.50 |
| June  | 0.00  |
| July  | 0.00  |
| Aug.  | 3.00  |
| Sept. | 73.50 |
| Oct.  | 0.00  |
| Nov.  | 25.00 |
| Dec.  |       |

Total hours expended: 1,265.50

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### COSTS INCURRED

|          |                       |        |
|----------|-----------------------|--------|
| 10/31/75 | Express Mail (2)      | 11.00  |
| 2/18/76  | Randolph Levine       | 83.85  |
| 4/22/76  | Susan Handler Menahem | 160.00 |
| 4/23/76  | Western Institute     | 100.00 |
| 4/26/76  | Copy Shoppe           | 5.68   |

|          |                                        |        |
|----------|----------------------------------------|--------|
| 5/28/76  | Copy Shoppe                            | 10.92  |
| 6/ 3/76  | Postmaster                             | 5.50   |
| 6/ 7/76  | U.S. District Court                    | 15.00  |
| 6/21/76  | Service (Robert Lopez)                 | 100.00 |
| 7/13/76  | Jerry Lopez (copy costs)               | 2.23   |
| 8/18/76  | Jones, Cazares, Adler & Lopez (copies) | 18.91  |
| 4/ /77   | Phone Bill                             | 3.13   |
| 5/ /77   | Phone Bill                             | 9.32   |
| 7/ /77   | Phone Bill                             | 6.20   |
| 7/14/77  | Gerald P. Lopez                        | 124.75 |
| 7/15/77  | U.S. Postmaster                        | 7.16   |
| 8/ /77   | Phone Bill                             | 8.75   |
| 8/11/77  | Express Mail                           | 5.50   |
| 9/ /77   | Phone Bill                             | 2.51   |
| 9/ 6/77  | Express Mail                           | 5.50   |
| 9/ 8/77  | Gerald P. Lopez travel expense         | 39.00  |
| 9/19/77  | Express Mail                           | 5.50   |
| 9/30/77  | Gerald P. Lopez Travel expense         | 40.00  |
| 9/30/77  | U.S. Postmaster                        | 5.60   |
| 9/30/77  | Express Mail                           | 6.25   |
| 10/ /77  | Phone Bill                             | 3.29   |
| 10/ 4/77 | Hernand Alcantar Travel                | 31.80  |
| 10/11/77 | Express Mail                           | 7.50   |
| 10/19/77 | Gerald P. Lopez Travel                 | 16.50  |
| 10/20/77 | Bessie Smith, Notary                   | 10.00  |
| 1/10/78  | Gerald P. Lopez Travel                 | 25.00  |
| 1/ 4/78  | Kaiser medical records                 | 11.00  |
| 2/23/78  | Jennie Rivera xeroxing                 | 25.00  |
| 3/10/78  | R. B. Cazares (depositions)            | 2.07   |
| 3/10/78  | Gerald P. Lopez travel                 | 25.00  |
| 3/15/78  | M. Flores, doctors depositions         | 64.40  |
| 5/23/78  | Insurance bond premium                 | 20.00  |
| 5/23/78  | Herman Alcantar (travel)               | 10.00  |
| 5/25/78  | Jerald P. Lopez copy expense           | 8.41   |
| 5/25/78  | U.S. District Court                    | 15.00  |
| 5/30/78  | Herman Alcantar (travel)               | 27.68  |
| 6/ 7/78  | Jerald P. Lopez travel                 | 30.00  |
| 6/ 8/78  | Civil Clerk Superior Court filing fee  | 157.00 |
| 8/ 1/78  | Herman Alcantar, mileage               | 20.80  |
| 8/ 9/78  | We Copy                                | 3.43   |
| 8/ 9/78  | Postage                                | 2.64   |
| 10/23/78 | Ed Webster Subpoena                    | 20.20  |

|          |                                                                     |        |
|----------|---------------------------------------------------------------------|--------|
| 10/25/78 | Herman Alcantar                                                     | 56.20  |
| 10/27/78 | Katherine A. Las, C.S.R.                                            | 95.00  |
| 11/ 8/78 | Ed Webster Subpoena                                                 | 20.20  |
| 11/ 8/78 | Donald Innskeep Subpoena                                            | 20.20  |
| 11/29/78 | Deposition of Ferguson travel                                       | 76.00  |
| 12/ 4/78 | Deposition of Ferguson travel                                       | 4.00   |
| 12/29/78 | Car Rental                                                          | 18.46  |
| 1/30/79  | Express Mail Service                                                | 7.50   |
| 1/31/79  | Trip expenses                                                       | 50.00  |
| 1/31/79  | Acapuleo Motor Hotel, L.A.                                          | 25.80  |
| 2/ 1/79  | Anna M. Williams, C.S.R.                                            | 138.12 |
| 2/ 1/79  | Bray & O'Daly, C.S.R.                                               | 98.68  |
| 2/ 1/79  | Racklin, et al, C.S.R.                                              | 15.00  |
| 2/14/79  | Fishburn, typeing, pre-trial                                        | 150.00 |
| 3/ 1/79  | Virginia A. Mejia, C.S.R.                                           | 229.58 |
| 3/ 1/79  | Bor-Air Freight                                                     | 65.00  |
| 4/ 6/79  | Purolator Courier                                                   | 7.75   |
| 5/ 2/79  | Motel Riverside                                                     | 15.90  |
| 5/31/79  | Marvin Givant Attorney Service                                      | 25.00  |
| 6/14/79  | Holiday Inn                                                         | 22.26  |
| 6/29/79  | Advance Travel                                                      | 28.00  |
| 7/ 2/79  | Car Rental, Hertz                                                   | 27.89  |
| 7/ 2/79  | PSA                                                                 | 28.00  |
| 7/ 6/79  | Bor Air Freight                                                     | 94.45  |
| 7/19/79  | Office Supply (appeal brief)                                        | 7.43   |
| 7/19/79  | U.S. Postmaster (mailing appeal brief)                              | 2.27   |
| 8/30/79  | Roy B. Cazares travel                                               | 75.00  |
| 9/24/79  | Marvin Givant attorney service                                      | 33.50  |
| 10/22/79 | Amtrak                                                              | 20.00  |
| 2/ 4/80  | Amtrak                                                              | 21.50  |
| 2/ 4/80  | Expenses Roy B. Cazares                                             | 20.00  |
| 2/28/80  | Postmaster Express Mail                                             | 7.50   |
| 3/17/80  | Roy B. Cazares per diem, Mark Crowley                               | 40.00  |
| 5/22/80  | Roy B. Cazares travel                                               | 52.34  |
| 9/12/80  | Roy B. Cazares per diem                                             | 100.00 |
| 9/16/80  | Officer Robert Plaitt witness fees                                  | 48.00  |
| 9/29/80  | Amtrak                                                              | 23.00  |
| 9/30/80  | Roy B. Cazares travel and per diem                                  | 100.00 |
| 10/31/80 | Roy B. Cazares per diem for each day<br>of trial, 17 days X \$50.00 | 850.00 |

---

TOTAL COSTS:

\$4,038.51

KOTLER & KOTLER  
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PATTI ANN KOTLER  
8500 Wilshire Blvd.  
Suite 903  
Beverly Hills, CA 90211  
(213) 652-6273  
Attorneys for Defendants

(Caption omitted in printing)

No. CV 76-1803 MRP  
Filed: January 7, 1981  
CLERK, U.S. District Court  
Central District of California

DEFENDANTS' MEMORANDUM OF POINTS  
AND AUTHORITIES AND DECLARATION  
OF JONATHAN KOTLER IN SUPPORT  
THEREOF IN RESPONSE TO MOTION BY  
PLAINTIFFS FOR ATTORNEYS FEES AND  
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(Caption omitted in printing)

MEMORANDUM OF POINTS  
AND AUTHORITIES

INTRODUCTION

On October 7, 1980, the jury, in the above-entitled matter awarded Plaintiffs judgment in the total amount of \$33,350.00—a sum that represented only a small fraction of the multi-million dollar recovery originally sought by Plaintiffs herein. Subsequent questions by a *Los Angeles Times* reporter (See 'Latinos, Police Both Claim Victories in Riverside Suit,' *Los Angeles Times* CC Part II 1,6 (Nov. 16, 1980) attached hereto as Exhibit "A" and incorporated herein by this reference as though set forth verbatim hereat) revealed that the jury foreman, Rene Wong, said: "We wanted the Riveras [Plaintiffs] to get something for putting up with the case for five years. But we didn't see any strong evidence to tell us to give them a whole lot of money, either." Mrs. Wong indicated to the *Times* reporter that "The jury had no idea the Latinos had sued for such a large sum in damages."

After the verdicts were read by the Court, counsel for Plaintiffs said: "On behalf of the Plaintiffs and their counsel, we will be making a motion for attorneys fees and perhaps a motion for additur." (See Reporter's Transcript p. 3 ll. 16-18 attached hereto as Exhibit "B" and incorporated herein as though set forth verbatim hereat.)

*Prior to any such motions being filed, the Court informed Defendants' counsel that: "Now, the only thing I tell you Mr. Kotler, is that he [Plaintiffs' counsel] is going to get substantial attorneys fees, because this is a*

lot of time we're talking about." The Court continued, (R.T. p. 6 ll. 5-9) "My disposition now, so that you would be aware of it, is that I would give Mr. Cazares the attorney's fees that cover everything that he did that's legitimate so that the burden of the attorney's fees does not fall on the parties." The Court concluded (R.T. p. 6, ll. 23-25, p. 7, l. 1) "And the final thing I say is that I have no quarrel with the quality of what he did. So if I have no quarrel with the quality and he gives me the hours, I will compensate him. And you'll [Mr. Cazares] have to tell me the rate."

On December 5, 1980, Plaintiffs' counsel filed their motion for attorneys fees and costs. They did *not* file a motion for additur, which might have gotten more money for their clients but rather, merely filed a self-serving motion for attorneys fees. The motion for attorneys fees appears to be a brazen attempt to obtain from the Court as attorneys fees 16 times the amount awarded to the Plaintiffs by the triers of fact—the jury.

Plaintiffs' last non-negotiable demand was for the sum of \$320,000.00. The total amount of judgment awarded in this case, however, was approximately 10% of that amount, the sum of only \$33,350.00. Only six of the original 32 Defendants have had verdicts rendered against them by the jury. Eighteen of these Defendants were dismissed earlier in this case after motions for summary judgment, the Court finding that there was no triable issue of fact against any of them as to *any claim* pleaded by Plaintiffs.

This case did not involve a class action. Rather, eight citizens of the City of Riverside recovered amounts varying from \$8,500.00 to \$700.00. No injunctive or declaratory relief was requested or awarded at time of trial, although

such relief had been sought by the Complaint filed herein. No policy changes of Defendant Riverside Police Department have been requested or made as a result of this trial, although, again, such was sought by the Complaint, though later dropped. Therefore, this litigation has in no way resulted in any long-range benefit for the community.

At no time during the trial did Plaintiffs' counsel attempt to vindicate the rights of an "oppressed minority." Plaintiffs in this case were middle class, fully employed, members of the Riverside community. At no time during the trial did the Plaintiffs claim that they had suffered discrimination on the basis of their race, color, or creed. This claim too, had been raised by the Complaint filed by Plaintiffs, and like the above-referenced claims, dropped by the time of the pretrial for lack of evidence.

Plaintiffs' attorneys have now petitioned this Honorable Court for fees which amount to nearly a half million dollars, or *sixteen times the total amount of the jury award*. Defendants respectfully contend that such a request is not only unreasonable, but is unconscionable under the circumstances of this case. It is a bold attempt by counsel to reap their own benefits from the case—and nothing more.

## POINTS AND AUTHORITIES

### 1.

#### ATTORNEYS' FEES WHEN REQUESTED, MUST BE REASONABLE.

"Courts must remember that they do not have a mandate . . . to make the prevailing counsel rich."

*Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974).

In discussing the statute authorizing attorneys' fee awards in an equal employment opportunity case, the Fifth Circuit found that the statute was not passed for the benefit of attorneys, but rather to enable litigants to obtain competent counsel worthy of contest with the caliber of counsel available to their opposition and to fairly place the economic burden of such litigation. *Johnson*, *supra*, at 719.

*Johnson* is quoted in *McPherson v. School District #186, Springfield. (sic) Illinois*, 465 F. Supp. 749, 756 (S.D. Ill. 1978) wherein the Court observed that:

"The Court in *Johnson* cogently states that there is no duty to make counsel for prevailing party rich. These standards were not passed for the benefit of attorneys, but to enable litigants to obtain counsel to preserve rights secured by the Constitution or Laws of the United States."

In *Keyes v. School Dist. No.1, Denver, Colo.*, 439 F. Supp. 393 (D. Colo. 1977), another civil rights case, the court outlined a "preferable method of computing an hourly figure for compensation." The method employed "is to consider all the factors . . ." and then arrive at an hourly rate or other figure which will represent fair and reasonable compensation, compatible to that which might be received in commercial litigation." *Keyes*, *supra*, at 413.

The *Keyes* Court also indicated that in computing attorneys fees awards in civil rights cases that,

"several courts have taken into account payments authorized under the Criminal Justice Act, 18 USC §3006 A(d) for compensation to attorneys who represent indigent defendants in criminal cases.



*E.E.O.C. v. Enterprise Ass'n. Steamfitters Local 638*, 542 F.2d 579, 593 n.12 (2nd Cir. 1976); *Panior v. Iberville Parish School Bd.*, 543 F.2d 1117, 1119 n.6 (5th Cir. 1976); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Thompson v. School Bd.*, 363 F.Supp. 458, 465 (E.D. Va. 1973). The current authorization under the Act is generally \$30.00 per hour for in-court service and \$20.00 per hour for out-of-court time." *Keyes*, *supra*, at 414.

In *Scott v. Bradley*, 455 F.Supp. 672 (E.D. Va. 1978), an employment discrimination case, attorneys fees in the amount of one-third of the recovery were found to be adequate. The Scott court acknowledged the primary purpose behind the Civil Rights Attorneys Fees Award Act was to encourage lawyers to represent persons in the civil rights field; however, the court concluded:

"A one-third contingent fee in the field of personal injury has proved most efficacious in encouraging counsel to represent injured plaintiffs in even the marginal cases of doubtful liability and transitory injury. There is no reason to believe similar awards where compensatory damages, as here, are substantial would not have the same effect in civil rights cases." *Scott*, *supra*, at 673.

The Court went on: "[E]ven without such protective legislation lawyers have been massively encouraged to enter the personal injury field upon the expectation of being compensated on a contingent fee basis." *Scott*, *supra*, at 674.

In *Scott* the Plaintiff was awarded compensatory damages in the amount of \$4,350.00.

"The Court recognizes that many types of civil rights cases do not result in any monetary reward and others result in only minimal monetary awards. Obviously, in such cases, a percentage fee would be inappropriate. This is not such a case, however, and



the Court need not base a fee determination on conditions contrary to fact." Scott, *supra*, at 674.

In the case at hand one-third of the \$33,350.00 award received by Plaintiffs is not a half-million dollars.

Based on the Scott guidelines, there is no reason to provide an economic windfall to Plaintiffs' counsel by awarding them sixteen times the award received by Plaintiffs in the instant action.

The Scott court continues at 675:

"The Court must also bear in mind that while lawyers are to be encouraged to accept civil rights cases they should not be encouraged to take over the cases. . . . Had the court awarded the sum sought the case would have been the lawyer's case with the client as an appendage. . . . The lawyer cannot be permitted to subsume the case."

Scott continues, "the amount of the verdict is often a good indicator of the reasonableness of the time expended and fee to be awarded." Scott, *supra*, at 675.

The Scott court could well have had the instant case in mind when warning that civil rights attorneys should be encouraged to represent plaintiffs, but should not be encouraged to over-prepare the case. According to the affidavit submitted by Gerald P. Lopez with the motion for attorneys fees, during the month of September 1980, he expended 73.5 hours, though he fails to indicate by breakdown how these hours were spent. The Court is asked to recall pages of jury instructions prepared by Mr. Lopez, and tossed aside by the Court, who indicated that Mr. Lopez's instructions would be unintelligible to the average juror. Scott, *supra*, at 674, reminds us that "[s]erious criminal offenses often draw fines of lesser magnitude than the aggregate of payments to be required of defendants in Plaintiff's proposal. Though a civil rights violation is a serious offense, it is, after all, a civil offense, not crime."

## 2.

## DETERMINATION OF LODESTAR

In *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d at 70, the Ninth Circuit adopted the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), as appropriate guidelines which courts should consider in determining reasonable attorneys fees. The twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), are:

1. The time and labor required;
2. The novelty and difficulty of the questions;
3. The skill requisite (sic) to perform the legal service properly;
4. The preclusion of other employment due to acceptance of the case;
5. The customary fee;
6. The contingent or fixed nature of the fee;
7. The time limitations imposed by the client or the case;
8. The amount involved and the results obtained;
9. The experience, reputation, and ability of the attorneys;
10. The undesirability of the case;
11. The nature of the professional relationship with the client; and,
12. Awards in similar cases.

Each of the foregoing factors will be examined in an attempt to assist the Court in its determination of what is a reasonable fee in this case.

A. THE TIME AND LABOR SPENT MUST BE REASONABLE.

The Court must first consider whether it was reasonable for Plaintiffs in this case to obtain out-of-the-area counsel (Mr. Cazares) when it was obvious that every time he had to investigate or appear in court there would be at least five hours of travel time involved.

In *McPherson v. School District #186*, Springfield, Illinois, 465 F.Supp. 749 (S.D. Ill. 1978), the Court made such an inquiry. In that case, as in the one at hand, it had not been shown whether any local attorney of comparable ability would have accepted the case.

In the case at hand, both counsel from San Diego (Mr. Cazares) and from Los Angeles (Mr. Lopez), were retained by Plaintiffs. However, time and time again the San Diego counsel made appearances in Los Angeles, while there was no explanation offered by Plaintiffs' counsel as to why it would not have been less costly and more appropriate for the Los Angeles counsel to have made the same appearance instead. One example as indicated in the hours submitted by Roy B. Cazares, are those hours from 9/29/80 until 10/7/80, comprising over fifty hours, during which time Mr. Cazares "stood by" for jury deliberations after traveling from San Diego to Los Angeles (sometimes daily). No indication has been by counsel for Plaintiffs herein why it was necessary for Mr. Cazares to spend this time, rather than have Mr. Lopez, who was already in Los Angeles during that time period, available as the "stand by" during that time period. Defense counsel whose office is in Beverly Hills, were on 30-minute notice from the Court. There has been no explanation of why Mr. Lopez could not similarly have been on 30-minute notice from Court, rather than

requiring Mr. Cazares to camp-out for over a week on a full-time basis in Los Angeles awaiting the verdict.

Granted that when the witnesses are located in Riverside and the court in Los Angeles, there will obviously be a certain amount of travel time required of all counsel. The point, however, is that had Plaintiffs been paying an hourly fee to their counsel it is likely that counsel would have been required to make a more judicious allocation of labor between the two co-counsel (the Los Angeles counsel and the San Diego counsel) to prevent the travel time aspect from getting economically out of proportion, as here.

In *McPherson, supra*, at 758, Judge Ackerman points out:

"In my opinion time spent traveling should not be compensated at the same hourly rate as office or court time. Efficiency is decreased and many times the circumstances allow little, if any productive effort."

Judge Ackerman consequently (sic) reduced the hourly rate he found reasonable for attorneys for travel time.

In *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714, 717 (6th Cir. 1978) the court found it incumbent to make a detailed analysis of how the attorney's time was spent:

"I do not believe that attorneys should receive the same hourly rate, as was allowed here, for every type of service which they perform. Thus, for example, time spent traveling should not be compensated at the same hourly rate as time spent in court, or time spent in the office looking up law, or talking on the telephone."

In *McManama v. Lukhardt*, 464 F.Supp. 38 (W.D. Va. 1978), a class action civil rights suit, the court came to the

conclusion that a lower rate must also be applied to hours spent on research, drafting, and other preparation, than for time that is actually spent in court. *McManama, supra*, at 43.

Thus, what is being respectfully suggested is that both the number of hours allowed by this Court *and* the rate at which the allowable hours are compensated, should be closely scrutinized and greatly reduced by this Honorable Court.

**B. FEE - PETITIONERS HAVE FAILED TO  
SHOW THAT THE QUESTIONS PRESENTED  
BY THIS CASE ARE EXCEPTIONALLY  
NOVEL OR DIFFICULT.**

A second factor suggested by *Johnson v. Georgia Highway Express, Inc., supra*, is to look to the novelty and difficulty of the questions presented.

As the Court is well aware, this is hardly the first civil rights 1983 action brought on the basis of state torts which has come before this or other courts. Fee-petitioners did not suggest any novel approach to the law, unless one could consider novel the fact that they suggested many unsuccessful avenues of recovery, most of which were dropped by the time of the pretrial after spending literally hundreds of hours on them—of Plaintiffs' counsel, defense counsel, and the Court. An attempt to support claims which have no basis in law or fact in this day of crowded dockets, can hardly be considered novel and thereby support additional amounts in fee awards. It is submitted that Plaintiffs have in no way prevailed on any type of novel theory in this case—let alone gone to the jury on any such theory.

The questions raised by this case were relatively simple. This was not a case of first impression. It did not in-

volve complex anti-trust issues. It was not even a class action. It merely involved interpretation of constitutional law and tort law issues which courts and attorneys have been analysing throughout the history of our judicial system. Perhaps the only difficult question of this case is the one before the Court at this point; whether the award of shocking attorneys fees can be justified is a case of minimal jury verdicts on a very small percentage of the claims pleaded, and against a very few defendants sued.

**C. FEE-PETITIONERS HAVE SHOWN THAT NO EXCEPTIONAL SKILL WAS REQUIRED TO PERFORM THE LEGAL SERVICES RENDERED HEREIN.**

The next factor listed in *Johnson v. Georgia Highway Express, Inc.*, is the skill requisite to perform the legal services properly. Unlike many civil rights actions, where counsel are called upon to create consent decrees, and otherwise devise innovative methods of resolving the issues, here all that was required was standard trial court skills—nothing more exceptional than would have been necessary for the most mundane of personal injury suits. The Court is asked to look at the results obtained by counsel in the Court's analysis of the skills displayed. A multi-million dollar prayer—a three hundred twenty thousand non-negotiable demand—and a thirty-three thousand dollar recovery.

**D. THERE HAS BEEN NO PRECLUSION OF OTHER EMPLOYMENT DUE TO THE ACCEPTANCE OF THIS CASE.**

The fourth *Johnson v. Georgia Highway Express, Inc.*, factor is the preclusion of other employment due to ac-



ceptance of the case. Here the practice of each of the co-counsel will be examined individually.

According to Mr. Lopez's own affidavit attached to the motion for fees, he is a full-time university professor at U.C.L.A. Not only has he been able to continue his other employment, but, according to 3 U.C.L.A. Law 15, Spring 1980, attached hereto as Exhibit "C" and incorporated herein by reference as though set forth verbatim hereat, Mr. Lopez, has received time and funding to study the exact same statute at issue in this case. Thus, we submit, Mr. Lopez has hardly been precluded from other employment due to the acceptance of this case, but rather has made this case one of the focal points of his other employment, for which, presumably, he has been fully compensated.

For many months this case has required of Roy Cazares no more than an hour or two per week of his attention. If one scrutinizes his affidavit carefully, it is easy to see that during 45 months of this 63 month case, he has spent less than two hours per week on this matter. Thus, while it appears from the general numbers that this case had a "life" of more than five years, such a figure is quite misleading in that for several months no work was done at all on this case, and during many other months no more than eight hours of Mr. Cazares' time per month were consumed by this case. Therefore, except for the time that was spent in trial, it seems that Mr. Cazares has hardly been precluded from accepting other employment. The post-trial time, as discussed above, to a certain extent, might well have been self-imposed preclusion of other employment due to the decision among co-counsel to have Mr. Cazares stand by in Los Angeles for a week, rather than have Mr.



Lopez, who was already in Los Angeles during that time period, remain on call.

#### E. THE COURT MUST EVALUATE COUNSELS' CUSTOMARY FEE.

*Preston v. Mandeville*, 451 F.Supp. 617 (S.D. Alabama 1978), a class action for contempt for failing to abide by a 1975 decree requiring adoption of random jury selection system, construed *Johnson v. Georgia Highway Express, Inc.*, to set forth the following guidelines on fees: "What is needed is the customary fee charged by these particular lawyers." *Preston, supra*, at 621. Thus, while the petitioners suggest an hourly rate in the Los Angeles area of \$150.00 per hour, at no point do they inform the Court what *their* hourly rate is.

Moreover, where time is logged over a period of years, the rate must be based on the attorney's rate for each year, not just the 1980 rate in Los Angeles. Thus, while the fee-petitioners implied in their motion that the Court should consider inflation as a factor in setting their rate, they can hardly rightfully request that the Court both allow for inflation and base the hourly rate on 1980 dollars. As *Imprisoned Citizens Union v. Shapp*, 473 F.Supp. 1017 (E.D. Pa. 1979), sets forth, an attorney cannot be compensated at 1980 rates for hours logged over a five-year period; compensation must be apportioned over that time, at the rates normally charged during the period in which the work was performed.

In *Heigler v. Gatter*, 463 F.Supp. 802 (E.D. Pa 1978), a civil rights action against city police officers in which \$11,566.00 was awarded to plaintiff on the basis of claims

made for § 1983, false arrest and imprisonment, assault, and battery, the court first computed the rate for counsel at \$50.00 per hour for non-trial time, and \$75.00 per hour for trial time, and then looked to the number of hours requested. The court acknowledged in that case, as in the one at hand, that where the time period consumed by the action is particularly long due to court scheduling difficulties, the plaintiffs' attorney is not entitled to additional fees. In our case, as the Court is well aware, counsel have been ready to go to trial for 28 months, although due to the court's crowded schedule, the trial scheduled originally for April 17, 1979, did not finally take place until late September 1980. Thus based on *Heigler, supra*, at 804, the long time span, over which this action continued—and was continued—was “primarily a function of scheduling difficulties rather than the complexity of the case,” and does not form the basis for an award of additional attorneys fees.

**F. THE CONTINGENT NATURE OF THE FEE DOES NOT NECESSARILY ENTITLE FEE-PETITIONER TO CARTE BLANCHE IN HIS AWARD.**

While *Johnson v. Georgia Highway Express, Inc.* suggests that the court look to the contingent or fixed nature of the fee, this, in and of itself, is not determinative of the fee award issue. This aspect will be discussed in more detail below.

**G. THERE WERE NO EXCEPTIONAL TIME LIMITATIONS IMPOSED BY THE CLIENT OR THE CASE.**

*Johnson v. Georgia Highway Express, Inc.*, suggests that time limitations imposed by the client or the case

should be a factor the court should consider in awarding fees. The fee-petitioners in this case were never under the eleventh-hour gun on this case in that they were present within three weeks after the incident. They have had ample time throughout this litigation to carefully draft all of their pleadings and perform all discovery they felt necessary. The fee-petitioners were never in the position of picking up another attorneys scattered files two weeks before time of trial. They were never in a rush to avoid a statute of limitations deadline, and they could in all instances prepare their pleadings and schedule discovery in manner compatible with their calendars.

#### H. THE AMOUNT INVOLVED AND THE RESULTS OBTAINED REQUIRE A GREATLY DIMINISHED FEE AWARD THAN THEY SOUGHT.

As discussed above, there was a multi-million dollar prayer in this action. The fee-petitioners, however, only obtained thirty-three thousand dollars for their clients. This amount was little more than eight thousand dollars more than the last settlement offer made by Defendants (see affidavit of Jonathan Kotler filed herewith and incorporated herein by reference as though set forth verbatim herein). The fee-petitioners have relied heavily on the recent case of *Keith v. Volpe*, 86 F.R.D. 565 (C.D. Ca. 1980). This case involved a class action in a successful challenge to the Los Angeles Century Freeway project which resulted in the project's compliance with federal and state laws as well as affirmative action on housing programs. Counsel in *Keith* were able to negotiate a settlement to provide for minorities to be given certain preferential employment in the 20,000-man project that called for

4,200 units of low and moderate income housing with an estimated value of two hundred-fifty million dollars, thereby conferring "substantial tangible benefits, both pecuniary and non-pecuniary, on the State of California and its inhabitants." *Keith, supra*, at 572. The counsel in *Keith* negotiated a final consent decree which set forth "a complex, but innovative settlement that promises to benefit the entire Southern California community for many years to come." *Keith, supra*, at 568. *Keith* is *not* talking about benefits to eight individuals in the amount of \$33,350.00. That fee-petitioners in the instant action should analogize their case to *Keith* seems at once pretentious, preposterous, and totally misleading.

# I. THE EXPERIENCE, REPUTATION, AND ABILITY OF FEE-PETITIONERS HAS NOT BEEN SHOWN TO BE OUTSTANDING

Unlike *Keith* where plaintiffs' counsel "provided first-rate legal service in successfully advocating the protection of the environmental and human interest at stake in this lawsuit involving 1.5 billion dollar freeway construction project," the counsel in the instant case had only just begun practice when they began representing these eight Plaintiffs. Gerald Lopez had only been out of law school for one year, and Roy Cazares for only two years. In May of 1975, according to the affidavit of Mr. Cazares attached to the instant motion, he and Mr. Lopez started in private practice together. This was only three months before they were retained by the Plaintiffs herein. Mr. Cazares's affidavit indicates that he has been involved with considerable litigation and civic activities over the past six years. (Apparently the instant case did not preclude Mr. Cazares

in any way from other employment.) While it is not the intent of this Response to denigrate Mr. Cazares's civic involvement, such involvement does not in any way indicate a special expertise in the field of civil rights.

Mr. Lopez, on the other hand, has offered us no information whatsoever regarding his experience, reputation or ability. Moreover, Mr. Lopez refers to the "litigious nature of defendants" (see affidavit of Gerald P. Lopez, page 4, line 7). The Court's attention is drawn to this remark to point out that this is perhaps the first time it has ever been suggested that a *defendant* is litigious, as opposed to a plaintiff. As the Court is no doubt aware, Defendants in this suit did not seek this litigation, but Defense counsel would be doing disservice to their clients if they remained passive and acquiesced to fee-petitioners' demands without a whimper. That Defendants, and not Plaintiffs, prevailed on the overwhelming majority of Plaintiffs' original demands speaks more eloquently than anything else of the "litigious" nature of parties herein.

**J. FEE-PETITIONERS HAVE FAILED TO  
DEMONSTRATE THAT THIS PARTIC-  
ULAR CASE WAS "UNDESIRABLE".**

Another of *Johnson v. Georgia Highway Express, Inc.*'s twelve factors is the undesirability of the case. Referring to the affidavit of Gerald P. Lopez submitted with the instant motion on page 2, line 25, Mr. Lopez submits to the Court the fact that he teaches courses devoted exclusively to civil rights legislation and teaches a civil rights litigation seminar. Based on this fact, the case at hand can hardly be said to be "undesirable" to Mr. Lopez. On the contrary, this is precisely the type of case which,

to Mr. Lopez, should be the most desirable. Similarly, Roy Cazares also represents himself to have a "general practice with a strong emphasis on civil rights" (see affidavit of Roy B. Cazares attached to the instant motion, page 3, line 21). Unlike the pioneering attorneys who initially risked their practices to represent the indigent and the downtrodden, Messrs. Cazares and Lopez have in fact *built* their practice on representing plaintiffs in civil rights cases. As discussed earlier, Plaintiffs in this case were neither disenfranchised immigrant workers, nor prisoners without access to law libraries, nor students deprived of decent education, nor families denied adequate housing. Rather, these Plaintiffs were fully employed, middle-class home owners and residents in the City of Riverside. Fee-petitioners herein have made some attempt by innuendo to change the character of Plaintiffs herein as it suits their need. During the time of trial the Plaintiffs were characterized as middle-class, law-abiding property owners. Now, for the purposes of obtaining fee awards, the fee-petitioners have implied that Plaintiffs are the meek and downtrodden. The jury by limiting its verdict to \$33,350.00 in a purportedly multi-million dollar case has indicated how it characterizes the Plaintiffs herein.

The Court is no doubt aware of the press coverage and publicity given to the instant action. Needless to say, such "free advertising" hardly makes this case undesirable, especially for attorneys who purportedly specialize in civil rights litigation. (See *Los Angeles Times* article dated November 16, 1980, previously referred to herein and attached hereto as Exhibit "A" and incorporated by reference as though set forth verbatim). In this article Mr.



Cazares was specifically identified by name and quoted about this case.

**K. FEE-PETITIONERS HAVE FAILED  
TO GIVE ANY GUIDELINES TO  
THE COURT REGARDING THEIR  
PROFESSIONAL RELATIONSHIP  
WITH THEIR CLIENTS.**

*Johnson v. Georgia Highway Express, Inc.* suggests that one other factor to consider in the award of attorneys fees is the nature of the professional relationship with the client. Fee-petitioners have offered absolutely no guideline whatsoever to the Court regarding the professional relationship they have with their clients. There has been no suggestion as to whether they have an on-going relationship, or whether they had not represented these clients before.

**L. THE COURT MUST LOOK AT  
AWARDS IN SIMILAR CASES.**

In looking to fee awards in other public interest cases, *Keyes v. School Dist. No. 1, Denver, Colo.*, 439 F.Supp. 393, 413, (D. Colo. 1977), supplied a list of fees which had been awarded in civil rights litigation:

“\$5.00/hour—*Spero v. Abbott Laboratories*, 396 F. Supp. 321 (N.D. Ill. 1975)

\$12.00/hour—*Brito v. Zia*, 478 F.2d 1200 (10th Cir. 1973)

\$14.00/hour—*Peltier v. City of Fargo*, 533 F.2d 374 (8th Cir. 1976)

\$22.10/hour—*Davis v. Board of School Commissioners*, 526 F.2d 865 (5th Cir. 1976)



\$20.00/hour for office work, \$30.00/hour for court work—*Wyatt v. Stickney*, 344 F.Supp. 387 (M.D. Ala. 1972); *Thompson v. School Board*, 363 F.Supp. 458 (E.D. Va. 1973), aff'd, 498 F.2d 195 (4th Cir. 1974).

\$20.00/hour for office work, \$40.00/hour for court work—*Latham v. Chandler*, 406 F.Supp. 754 (N.D. Miss. 1976).

\$30.00/hour average, \$50.00/hour for appeal to United States Supreme Court—*Norwood v. Harrison*, 410 F.Supp. 133 (N.D. Miss. 1976).

\$50.00/hour—*Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. C.A. 1974); *Wallace v. House*, 377 F.Supp. 1192 (W.D. La. 1974).

\$50.00 to \$70.00/hour depending upon experience—*Torres v. Sachs*, 69 F.R.D. 343 (S.D. N.Y. 1975), aff'd, 538 F.2d 10 (2d Cir. 1976).

\$64.80/hour—*Swann v. Charlotte Mecklenburg Bd. of Education*, 66 F.R.D. 483 (W.D.N. C. 1975).

\$65.00/hour—*Davis v. County of Los Angeles*, 8 E.P.D. § 9444 (C.D. Cal. 1974).

### 3.

#### FEE-PETITIONERS REQUEST FOR COMPENSATION IS DEFECTIVE IN FORM IN THAT HOURS AND RATES ARE NOT ITEMIZED.

The itemization of hours and specification of the rates submitted by Mr. Lopez was not done in his affidavit. According to *Keown v. Storti*, 456 F.Supp. 232 (E.D. Pa. 1978), such a defect must be remedied. When Mr. Lopez cures this defect however, *Heigler v. Gatter*, 463 F.Supp. 802 (E.D. Pa. 1978), requires that *any figure* that Mr. Lopez reconstructs is suspect and must be reduced approximately 20 percent because of his failure to keep contemporaneous time records.

## 4.

**ONLY SERVICES RENDERED FOR THIS PARTICULAR CASE SHOULD BE COMPENSABLE.**

As this Honorable Court may be aware, there is currently pending a separate lawsuit filed by eighteen of the original Defendants, who were dismissed from the instant action, against Plaintiffs. (*Albee v. Rivera* C.A. No. 78-3319 D.C. No. 78-2076, United States Court of Appeals for the Ninth Circuit.) That is a different case originally brought in the state court for malicious prosecution. Any fees counsel charged for defense of that proceeding which were included in the award presently sought, would be for fees not for services rendered in this case, and therefore, are not compensable by this motion. From the face of the affidavits of Mr. Lopez and Mr. Cazares, it is not apparent how much of the time spent by counsel was connected with the Albee case. According to *Keown v. Storti*, 456 F.Supp. 232 (E.D. Pa. 1978), time spent by counsel on this related Albee matter must be subtracted from the time requested in the instant motion.

## 5.

**ANY ATTORNEYS FEES AWARDED MUST BE PROPORTIONATE TO THE RECOVERY IN THE UNDERLYING SUIT.**

Originally these eight Plaintiffs had presented six separate claims against 32 Defendants, for a total of 1,536 claims. The jury, however, provided recovery on only 37 of these 1,536 claims. Any fees awarded must take into account this disparity. In *Scheriff v. Beck*, 452 F.Supp. 1254 (D. Colo. 1978), a civil rights action, the court con-

cluded that where plaintiff prevailed in his civil rights action against one defendant but did not prevail with respect to another defendant, the civil rights statute permitted fees to be awarded, but only as to sums reasonably expended against the defendant over whom plaintiff prevailed. In *Scheriff, supra*, at 1259, the court suggested:

“Where, as here, plaintiff prevailed as to only one of the two defendants and has demonstrated no way in which to apportion his time, the court will simply cut the fee request by one-half.”

The *Scheriff* court then looked to Plaintiff's success on his three separate claims and observed that he had recovered on only one. As a result, the court reasoned, “any recovery should take into account this disparity.” *Scheriff, supra*, at 1259. The *Scheriff* court concluded at 1260 in this case however, that,

“While we would normally apply the proportionate recovery rule, we need not do so here. In this case, in the exercise of our discretion, the court has decided to withhold any award of fees in favor of plaintiff. . . . It is recognized that in some cases, while a plaintiff may sustain his claim of civil rights violations, an attorney's fee award is simply not appropriate. Such a case was *Sprogis v. United Airlines, Inc.*, 517 F.2d 387 (7th Cir. 1975). There plaintiff ostensibly brought suit against the airline for violation of Title VII, 42 U.S.C. § 2000e *et. seq.*, through the employers no marriage rule. The District Court had awarded plaintiff \$10,408.00 and thereafter, plaintiff filed an application for \$45,000.00 in attorney's fees. The court denied the application on a variety of grounds, including the fact that plaintiff was not the real party in interest (the real party having already reached a “class-action accord” with the, airline), that the *precedential value of the suit was limited*, that the suit was not of the type envisioned

by Congress in passing the underlying legislation, *and that the claim for fees was not proportionate to the recovery.*" (emphasis added.)

The Scheriff court was outraged by the disparity between the fee request and the amount of recovery: plaintiff's fee and cost request was some 40 times the amount of his recovery. Based upon the facts in Scheriff the court denied the plaintiff's motion for an award of any fees and costs. In the within case, fee-petitioners are seeking an award nearly 16 times the amount of the jury award to the plaintiffs.

Similarly, the court in *Keown v. Storti*, 456 F.Supp. 232 (E.D. Pa. 1978), limited the amount of an attorneys fees award to plaintiff to the extent that he was successful in asserting his claims. *Keown* held further that for the purposes of fees act, defendants who successfully defend all claims asserted against them are "prevailing parties" and are therefore entitled to fees. *Keown*, supra, at 243.

In *Keyes v. School Dist. No. 1, Denver, Colo.*, 439 F.Supp. 393 (D. Colo. 1977), plaintiffs and intervenors sought fees, costs, and expenses as prevailing parties. The court addressed this specific issue, and concluded that the award should be limited to the extent to which Plaintiffs and intervenors actually prevailed in litigation.

"Some court have discounted requests for attorneys' fees by an amount comparable to the extent to which parties did not prevail. E.g. *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 (9th Cir. 1972); *Armstead v. Starkville Mun. Sep. School Dist.*, 395 F.Supp. 304, 312 (N.D. Miss. 1976); *Chance v. Board of Examiners*, 70 F.R.D. 334 (S.D. N.Y. 1976). While certain jurisdictions have rejected this position

*Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Calif. 1974), the Tenth Circuit has adhered to the reduction rule. In *Pearson v. Western Electric Co.*, 542 F.2d 1150, 1153, (10th Cir. 1976), the court stated: 'It is only when a party has prevailed in a court action that he may be entitled to attorney's fees *proportionate to the extent of his recovery*. *Williams v. General Foods, Corp.*, 492 F.2d 399, 409 (7th Cir. 1974); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 (9th Cir. 1972).' (emphasis added). Thus, we are of the view that attorneys fees should be awarded to plaintiffs and intervenors but that awards should be limited to the extent to which they prevailed in this litigation."

In *Keyes* the court found that the intervenors and plaintiffs prevailed to an extent of 85% of the recovery requested by them, and accordingly, after determining an appropriate fee, the award to the intervenors and plaintiffs was reduced by 15%.

In cognizance of Chief Judge Seitz' admonition in *Hughes v. Repko*, 578 F.2d at 486 against the use of an automatic fractional reduction of the lodestar, Joseph S. Lord, Chief Judge nonetheless, *had no choice but to decrease the award by the percentage plaintiff lost claims* in *Imprisoned Citizens Union v. Shapp*, 473 F.Supp. 1017 (E.D. Pa. 1979), *because fee petitioning counsel failed to give any guideline as to what portion of their time was spent on compensable, prevailing, issues.*

## 6.

### USE OF A "MULTIPLIER" OR A "BONUS" IS NOT MERITED.

In *Heigler v. Gatter*, 463 F.Supp. 802 (E.D. Pa. 1978), the District Court held that plaintiffs counsel was entitled



to a fee award of \$5,725.00, computed at a rate of \$50.00 per hour for non-trial time and \$75.00 per hour for trial time, in addition to \$523.40 for unreimbursed costs. This award was following successful civil rights litigation against two city police officers in which \$11,566.00 was awarded to plaintiffs' Plaintiff, an individual, brought the action under 42 U.S.C. 1983 and alleged pendent state claims for false arrest and imprisonment, assault, battery, and malicious prosecution. The Heigler court found that "Plaintiff's counsel conducted the case in a competent manner worthy of someone with his skill and experience. These factors were adequately compensated in considering a reasonable hourly rate and there was not unusual performance justifying an increase in this case." *Heigler, supra*, at 805.

The court reached its decision upon the theory that "any addition to or subtraction from the lodestar to account for the quality of an attorney's work 'is designed to take account for an unusual degree of skill, be it unusually poor or unusually good.' " *Baughman v. Wilson Freight Forwarding Company*, 583 F.2d 1208, 1218 (3rd Cir. 1978) quoting *Lindy Brothers Builders of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3rd Cir. 1973); see *Lindy Brothers Builders of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3rd Cir. 1976) (*Lindy II*). *Heigler* continued,

"the contingency factor does not justify an increase for several reasons. This case was neither factually nor legally complex. *Lindy II supra*, at 117. This lack of complexity manifested itself in a risk of relatively small number of hours being expended without compensation. *Id.* Finally, where 'the lode-

star as originally calculated by the district court [is] a significant amount in comparison to the amount awarded plaintiff in damages,' the court should be reluctant to increase the lodestar through the contingency factor. *Baughman, supra*, at 1218. In this case, the lodestar constitutes a substantial percentage of the recovery received by plaintiff. Therefore, we conclude that no further adjustment to the lodestar is warranted." *Heigler, supra*, at 805.

In another civil rights case, *McPherson v. School Dist. No. 186, Springfield, Ill.*, 465 F.Supp. 749 (S.D. Ill. 1978), this court found that a multiplier of the hourly rate should not be used in that it was not permitted by the federal statute mandating an award to plaintiffs of attorneys fees and costs in civil rights litigation. See *McPherson, supra*, at 764.

Likewise, the court in *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714 (6th Cir. 1978), construed 42 U.S.C. § 1988 in light of 20 U.S.C. § 1617 to only provide for recovery of a "reasonable attorney fee". The court in *Oliver* recognized that multipliers had been used in anti-trust cases, but found the use of such cases as analogous to civil rights cases with respect to the attorney's fee issue inapposite since there is usually a large monetary recovery in anti-trust cases. *Oliver* went on to say "attorneys fees awards should be high enough to attract competent counsel, yet not so high as to provide a windfall for them. Multiplying the number of hours properly spent times a reasonable hourly rate is sufficient to serve this goal." *Oliver, supra*, at 716.

The contingency nature of this action was not unusual enough to warrant an increase in lodestar. As stated in *Imprisoned Citizens Union v. Shapp*, 473 F.Supp. 1017, 1027 (E.D. Pa. 1979),



“Success here, albeit uncertain, was not so remote a likelihood that counsel deserves to be compensated simply for taking the case. For over a decade, litigation of this sort has not been a stranger in the federal courts and the contingencies involved in bringing this suit are, to a great extent, foreseeable, and not extraordinary.”

## 7.

CASES CITED BY FEE-PETITIONERS IN  
SUPPORT OF USE OF A MULTIPLIER  
ARE DISTINGUISHABLE.

Fee-petitioners, in their Memorandum of Points and Authorities in support of the instant motion, have contended that the use of a multiplier is appropriate in this case. To support their contention they have cited several cases which will be discussed individually at this point.

The first case presented by fee-petitioners is *Lindy Brothers Builders, Inc., of Phila. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973). Lindy is the leading *anti-trust* attorneys fees case. Unlike the instant action, *Lindy* was a *class-action*. It was the court's task, upon the petitioners' request, to determine the proper award of attorneys fees to be paid from the settlement of the class action according to the equitable fund doctrine in an attempt to have the benefited parties pay the fees. It was as a result of a settlement agreement entered into therein that a single fund was created to satisfy the claims of all of the plaintiffs as well as those who had not filed suit. Attorneys fees were to be paid from this single fund, thus, in *Lindy*, the defendants were paying for plaintiffs attorneys fees only indirectly as part of the total settlement. Defendants were not required to

pay plaintiffs' attorneys fees in addition to the recovery by plaintiffs. The attorneys fees were merely a piece of the larger settlement pie. This is not at all like the case at hand where individual plaintiffs received individual specific awards by way of jury verdict, and now fee-petitioners request *additional sums* to be paid by Defendants as attorneys fees.

Similarly, in *In Re Gypsum Cases*, 386 F.Supp. 959 (N.D. Ca 1974), another *anti-trust* action, the court also applied the *equitable fund doctrine*: that is, it awarded attorneys fees out of a pre-determined settlement amount.

The third case raised by the fee-petitioners is *Philadelphia v. Charles Pfizer & Co. Inc.*, 345 F.Supp. 454 (S.D. N.Y. 1972). This case is another example of an *anti-trust class action* creating a *settlement fund* from which attorneys fees were awarded, and is also one in which there was a prior agreement between counsel regarding the award of fees.

The next case cited by fee-petitioners is *Arenson v. Board of Trade of City of Chicago*, 373 F.Supp. 1349 (N.D. Ill. 1974) in which fee-petitioners claim a multiplier of four was awarded. Unfortunately, *Arenson* was miscited, and defense counsel have been unable to locate it at this point in time. Perhaps the fee-petitioners might supply defense counsel with a corrected citation or a copy of this case, so that they might be able to determine whether *Arenson* is another *anti-trust class action equitable fund doctrine case*.

Finally, fee-petitioners refer to an *unpublished opinion* in *Goldstein v. Alodex Corp.*, Civ. No. TI-1857 (E.D. Pa. December 7, 1973), in which they claim a multiplier

of five was awarded. This case is likewise unavailable to defense counsel—as Plaintiffs attorneys must be well aware.

And, again, fee-petitioners refer us to *Keith v. Volpe*, 86 F.R.D. 565 (C.D. Ca. 1980), to support the use of a multiplier, albeit even this case has applied the *common fund, common benefit doctrine* and has instructed at 571:

“The Supreme Court limited this doctrine in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), to those cases where the members of the benefited class are sufficiently identifiable and the tangible benefits sufficiently ascertainable so that fee shifting would ‘with some exactitude’ shift the costs of litigation to those benefiting from the suit. *Id.* at 265 N.39. See also *U.S. v. Imperial Irrigation District*, 595 F.2d 525, 529 (9th Cir. 1979); *Reiser v. Del Monte Properties Co.*, 605 F.2d 1135, 1139 (9th Cir. 1979).”

The common benefit doctrine requires that an action must confer substantial benefit on others (i.e. shareholders), person benefited must comprise an ascertainable class, and the award of attorney fees must operate to shift the cost of litigation to such a group. *Reiser v. Del Monte Properties Co.*, 605 F.2d 1135 (9th Cir. 1979). Here there has been no showing that an ascertainable class of persons benefited from the award of \$33,350.00 to the eight plaintiffs; nor has there been showing that all the citizen-taxpayers of the City of Riverside gained from this suit. It is in reality those taxpayers who would be asked to pay the cost of this suit by increased insurance premiums on the municipal coverage.

*U.S. v. Imperial Irrigation Dist.*, 595 F.2d 525 (9th Cir. 1979), examined the “substantial benefits” doctrine and observed:

“justification for this exception [to the traditional rule disfavoring awards shifting legal fees] is that identifiable persons who benefit substantially from the action of the party seeking fees should share the costs. ‘To allow the others to obtain full benefit from the plaintiff’s efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff’s expense.’ *Mills*, 396 U.S. at 392, 90 S.Ct. at 625. *See also Hall v. Cole*, 412 U.S. 1, 5-6, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). However, because the beneficiaries frequently are not parties or members of a certified class before the court, this exception is subject to an important limitation that bars an award in this case. The limitation is that there must be before the court a party against whom the court can assess fees who stands in such a relationship to the benefited class that the award will ‘operate to spread the costs proportionately’ and ‘with some exactitude’ among the identifiable beneficiaries of the fee-seeker’s success. *Mills*, 396 U.S. at 394, 90 S.Ct. at 626; *Alyeska*, 421 U.S. at 265 n.39, 95 S.Ct. 1612. Only when this is true will attorney’s fees be effectively spread among those who stand to gain from the litigation without contributing to it, rather than simply being shifted to the loser. (As the *Mills* court put it: ‘[t]o award attorney’s fees in such a suit to a [successful] plaintiff . . . is not to saddle the unsuccessful party with the expenses but to impose them on the class that would have had to pay them had it brought the suit.’ *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396-97, 90 S.Ct. 616, 628, 24 L.Ed.2d 593 (1970). *See also Hall v. Cole*, 412 U.S. 1, 6, 93 S.Ct. 1943, 36 L.Ed.2d 102 (1973).)

The two leading Supreme Court cases are illustrative. In *Mills*, a shareholder prevailed in an action to set aside the merger of his corporation into another because in recommending approval of the merger the directors of his corporation had failed to disclose that they were controlled by the acquiring company. The Court shifted the shareholder’s attorney’s fees to the

corporation because the suit conferred a substantial benefit on all shareholders and the corporation itself, and because '[T]he court's jurisdiction over the corporation as the nominal defendant ma[kes] it possible to assess fees again all of the shareholders through an award against the corporation.' 396 U.S. at 395, 90 S. Ct. at 627. All shareholders benefited from vindication of the securities fraud rules and, by requiring the payment of the counsel fees from the corporate treasury, all would be taxed their proportionate share of the costs through lowered dividends. The reasoning in *Hall v. Cole* is similar: the plaintiff-union member vindicated the rights of free speech in union affairs and thus 'rendered a substantial service to his union as an institution and to all of its members' (412 U.S. at 8, 93 S.Ct. at 1948); shifting plaintiff's counsel fees to the union would effectively charge all of the members with the cost of achieving the common benefit by taking a share of each member's dues.

\* \* \*

Ready identifiability is required to insure clear, concrete evidence that the fee-seeker's efforts produced actual benefits to others, and that fees are assessed only against beneficiaries—those who would be unjustly enriched by not sharing in the cost of producing the benefit—and not against persons whose positions are not substantially bettered because of the victorious lawsuit.

Thus it is apparent that the substantial benefits doctrine is inapplicable in this case because Plaintiffs have totally failed to show that anyone other than they themselves will benefit from this suit.

The Court's attention is directed to the fact that there simply was no common fund, equitable fund, or any other fund created in this case. The jury awarded each indi-



vidual Plaintiff funds in specified amounts for specified damages.

## 8.

DOWNWARD ADJUSTMENT OF THE OBJECTIVE VALUE OF COUNSEL'S SERVICES IS REQUIRED WHERE ONLY A FEW CITIZENS HAVE BENEFITED AND NO WIDESPREAD OR PERVASIVE VIOLATIONS OF CIVIL RIGHTS HAVE OCCURRED.

Once again, the Court's attention is directed to *Keown v. Storti*, 456 F.Supp. 232, 242 (E.D. Pa. 1978). The court in *Keown* on its own initiative, adjusted the objective value of counsel's services downward:

"This case vindicated the rights of only one person—Robert Keown. *It was not a class action. It did not produce any new law* that, through *stare decisis*, will greatly benefit others. The violation that was remedied was not widespread or pervasive; indeed, the jury found that Defendant Storti acted unlawfully only with respect to Robert Keown and not as to his wife. Although redress of any civil rights violation advances the public interest, the advancement in this case was minimal. The \$2,500.00 damage award, which, in my view, was far in excess of proven compensatory damages, provided the Plaintiff more than full compensation for his injury." (emphasis added)

Thus, as in *Keown*, Plaintiffs in the instant action have been compensated for all injury. This is particularly so when, as here, Plaintiffs counsel offered at trial evidence of less than \$300.00 in damages.

## 9.

**BONUSES ARE NOT AVAILABLE UNDER  
42 U.S.C. § 1988.**

“Since the purpose of Title 42, U.S.C.A. § 1988, is to assure private civil rights litigants of representation rather than to provide windfalls to attorneys, the Court is convinced that the request for bonuses is due to be denied. *Preston v. Mandeville*, 451 F. Supp. 617, 623, , (S.D. Ala. 1978).”

In *Preston*, the court not only addressed the issue of bonuses but also analyzed whether or not such a civil rights case was “undesirable” in relationship to counsel’s request for a bonus:

“The *Johnson* [*Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)] court was concerned about the economic impact that the acceptance of a civil rights suit might have on an attorney’s law practice. Counsel for the plaintiffs assert that the ‘undesirability’ of this particular case and civil rights cases in general ‘is evidenced by relatively few members of the Mobile Bar who have chosen to represent plaintiffs in cases of this nature.’ This is not within the scope of ‘undesirability’ as envisioned by the *Johnson* opinion. The Court has already noted that Hicks and Mandell [counsel in the *Preston* case] do a great deal of civil rights work, and that Brown’s law firm is similarly engaged. Under these circumstances the Court is convinced that no malevolent economic effect will be felt by these attorneys; indeed the experience and reputation gained from such proceedings will no doubt aid each in their future practice.” *Preston, supra*, at 622.



## 10.

**THERE IS NO STATUTORY RIGHT TO  
PAYMENT OF OUT-OF-POCKET EXPENSES.**

Overhead is not a compensable cost. Postage, clerical and typing services, reproduction, mailing, long-distance telephone calls, secretarial overtime and transcript have all been considered by the courts to be regular office overhead and not a compensable cost. *Keith v. Volpe*, 86 F.R.D. 565 (C.D. Ca. 1980); *Cole v. Tuttle*, 462 F.Supp. 1016 (N.D. Miss. 1978).

Similarly, travel expenses and long-distance phone call expenses incurred by Mr. Cazares in this case should be reduced as it was done in *McPherson v. School Dist. No. 186, Springfield, Illinois, supra*, at 763, with regard to the selection and use of out-of-town counsel. Courts have been mixed in their determination of whether law clerks and paralegals should be included in an award of attorneys fees. Both *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714 (6th Cir. 1978) and *Scheriff v. Beck*, 452 F.Supp. 1254 (D. Colo. 1978) have held that paralegal and law clerk services are merely part of attorney's overhead and should not be considered in an award of attorney's fees.

## 11.

**FEE-PETITIONERS ARE NOT ENTITLED  
TO AN INTERIM AWARD OF FEES**

Fee-petitioners in their memo of points and authorities attached to the instant motion have contended that they are entitled to an interim award of fees. Defense counsel herein have difficulty comprehending the nature of fee-petitioners request, as well as the applicability of

cases cited by fee-petitioners to support their contention. *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972) totally fails to address the issue of interim fees. Likewise, *Davis v. County of Los Angeles*, 8 E.P.D. § 9444 (C.D. Ca. 1974), also totally fails to address the issue of an *interim* award of fees. In *Malone v. North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972), the court awarded \$2,500.00 in attorneys fees for services on the appeal "that amount having been stipulated to as reasonable by North American's counsel." *Malone, supra*, at 781. This, too was not an "interim" award.

We agree with fee-petitioners that an award of attorneys fees can be an integral part of the relief sought in a civil rights action and therefore the judgment is not final and appealable until they have been set by the Court, after proper request for same.

However, are Plaintiffs' counsel implying by the request for an award of attorneys fees in the instant case, that they should be paid whatever sum they have request at this point, regardless of whether the Defendants should choose to appeal such an award? Where is the statutory or case law authority for such a request? It is not reasonable to conclude that such an award of interim fees is implanted in the Civil Rights Act.

## 12.

### THE ECONOMIC IMPACT OF FEE AWARDS MUST BE EXAMINED BY THE COURT.

Recent cases have suggested that the Court must be cognizant of the economic impact of monetary awards where the financial risk, or burden, is shifted from one party to another. Such a shift must result in the greater

good, i.e. lower cost, redressed wrong, to benefit the larger group of persons. Here, as in *Oliver v. Kalamazoo, supra*, at 718, there is being created a tax-payers' burden, for it is the Riverside taxpayer who is being asked to pay Mr. Cazares and Mr. Lopez. This is because, although the City is covered by insurance, the insurance premiums are paid by tax dollars. Just as automobile insurance rates increase with sizeable claims and recoveries, so do insurance rates for municipalities. The cost to the tax-payers who have been requested by fee-petitioners to pay their fees must be weighed as compared to the benefit to the eight individual Plaintiffs in the instant action and, of course, their two attorneys.

As in *Keyes v. School Dist. No. 1, Denver, Colo., supra*, at 415, it must be remembered that the public must bear the financial burden and that "attorney fee entitlement cannot jeopardize the financial realities of the agency paying the fee;" in this case, the City of Riverside. It was found in *McPherson v. School Dist. No. 186, Springfield, Ill., supra*, at 757, that "Defendant is a public body and a fee award is essentially reallocating a portion of the property tax area residents pay [from one civic benefit to another]. . . . It is incumbent [on the court] to scrutinize Plaintiffs' fee request to assure the public is not overcharged."

DATED: December 31, 1980.

Respectively submitted

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/s/ Patti A. Kotler  
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LOS ANGELES TIMES  
METRO

Sunday, November 16, 1980  
Local News  
CC Part II

*Latinos, Police Both Claim Victories  
Lawmen Hope Barrio Controversy Ends*

By LORRAINE BENNETT, Times Riverside-San Bernardino Bureau

On the night of Aug. 1, 1975, as Riverside sweltered in sticky summer heat, Jennie and Santos Rivera prepared a bachelor party for their nephew.

Guests began to arrive and gathered in the Riveras' open garage, where they sat drinking and talking.

From time to time, a black and white unit from the Riverside Police Department cruised by, patrolling the loose confines of Casa Blanca, Riverside's explosive Latino barrio, where the password is violence.

Accounts vary now, five years later, about who started what. But the clash between the Riveras' guests and Riverside police that August night resulted in 51 arrests — the largest number ever jailed from a single incident in Riverside history.

At least two Latinos suffered injuries, and one police officer was hurt so seriously he was forced to retire from the force.

In the wake of the arrests came two trials. The first was a criminal case in which three of the party guests were convicted and received sentences ranging from probation to fines and 30 days in jail.

The second trial, stemming from a lawsuit filed against the City of Riverside and its police department, ended Oct. 7 when a federal jury in Los Angeles awarded a total of \$33,850, plus lawyers' fees, to eight Latinos and found the police guilty of violating their civil rights.

Attorneys for the Latinos plan to seek an increase in the amount of damages when they return to court Dec. 15.

In spite of what they consider to be small awards, they view the decision as a significant civil-rights victory because it marks the first time such convictions have been returned against Riverside police.

To police, however, the amount of damages is a message from the jury that the officers acted with some justification. They hope the jury's decision will bring an end to five years of controversy between authorities and residents of the barrio.

### *Unlikely That Hard Feelings Will End*

It appears unlikely, however, that hard feelings among the Casa Blanca Latinos will end now. This is a small ethnic pocket originally carved from citrus groves by Mexican farm workers. It lies south of Interstate 91, a square-mile community far removed in concept from the rest of Riverside.

With its ethnic graffiti and spectacular sidewalk murals, Casa Blanca carefully guards its identity against encroaching industrial development and tract housing.

The barrio has gained national notoriety as an infamous battleground where two warring Latino families have engaged in a blood feud that began 16 years ago between drinking partners in a local bar.

The feud has escalated since the mid-1970s. Eight members of the two feuding families, the Ahumadas and Lozanos, have been gunned down during such simple activities as sitting on a front porch or strolling down the street.

Tension already was thick in Casa Blanca on Aug. 1, 1975, when Jennie Rivera and her husband Santos prepared to open their comfortable, well-groomed home for an evening in honor of nephew Lee Roy Rivera's upcoming wedding.

Mrs. Rivera does not, to this day, consider her home a part of Casa Blanca. But boundaries blur in neighborhood communities. Although the barrio proper lies half a mile away in Jennie Rivera's mind, to Riverside police, her house is still within Casa Blanca's "sphere of influence," and when any crowd gathers there, police take notice.

As a matter of course, officers already were patrolling the Riveras' neighborhood in strengthened numbers that night. An Anglo family had argued with a Latino family. In the exchange of insults, the two groups had been seen sitting in their front yards with rifles across their laps. Police patrols had increased.

So as the Friday night party crowd gathered at the Rivera house, police patrols were already cruising the neighborhood and the crowd took notice.

Time and emotion have distorted the sequence of events of that evening. Police claim the first incident involved a minor carrying a cup of beer. They say he came from the Rivera house.



Police say they did not pursue that violation, but when they received a prowler report and saw two other youths scurry away, and when a pickup truck rolled down the street with its lights blinking and the driver displaying open containers of alcoholic beverages, the police decided to investigate.

During the interrogation, police say, a group of Latinos from the Rivera party interfered, a scuffle broke out and the group began throwing dirt clods, rocks and bottles at officers.

Police called for reinforcements. Additional units and a police helicopter arrived, and the party goers retreated into the Rivera house.

An order to disperse, given over the helicopter loud-speaker was ignored, police say, and they were forced to use tear gas to flush the crowd from the house.

The Latinos claim they never heard such an order, that police first told them to go inside, then tear gassed them out.

Jennie Rivera has a vivid recollection of stumbling, blinded by tear gas, through her front door and coming face to face with lines of uniformed officers, one line kneeling in front of the other.

They were pointing rifles at the house, she says. Police, however, say no rifles were in use that night, and that regulation shotguns remained in police vehicles. What Mrs. Rivera saw may have been batons in the hands of officers, police say.

One of the Latinos, Jerome Rivera, a brother of the guest of honor, was hit over the head in a scuffle with



police. Witnesses say another party goer, Manuel Flores, Jr., was struck so hard an officer felt for his pulse.

Police contend Jerome Rivera assaulted an officer with a belt he had wrapped around his hand. They say Flores threw a large dirt clod at officers.

Mrs. Rivera is certain that what she saw was rifles. She contends the people attending her party were herded together like cattle, handcuffed and carted off to the police station although, she says, they had done nothing wrong.

Charges against most of those arrested were dropped shortly afterward. In early 1976, a Riverside jury convicted two men and a woman on charges that included battery against a police officer and resisting arrest. Their sentences ranged from probation to fines of \$190 and 30 days in jail.

The jury failed to return a verdict on three more Latinos accused by police. The district attorney's office requested dismissal of charges against two others.

In June, 1976, eight Latinos filed suit against the City of Riverside, the police chief and 31 officers for violating their civil rights, false arrest and imprisonment, malicious prosecution and negligence. They sued for \$9.75 million and requested a jury trial.

### *Eight Settled for \$16,000*

The civil suit also accused the police of conspiring to cover up the events of Aug. 1 by filing false reports.

Other issues in the case included whether the Latinos had heard and understood the order to disperse, whether police actually witnessed persons committing arrestable

offenses and whether officers used undue force in making the arrests.

When the federal jury in Los Angeles finally handed down its decision, it found the police department and four officers guilty of violating the civil rights of eight Latinos during the disturbance.

It found no evidence that police conspired to cover up what had actually occurred by filing inaccurate reports.

"We're just glad it's over," said Deputy Police Chief L. L. (Sonny) Richardson, a sargeant (sic) on the police force in 1975 and one of the defendants in the case.

"As long as that lawsuit was hanging, it had a chilling effect on (police) relations with the Casa Blanca community."

Richardson feels what happened five years ago was "another time and place." Changes have been made, including the installation of a new police chief and better training for officers in dealing with barrio disturbances, he said.

Richardson is one of those who believe the jury sent the police department a message by awarding what has been considered a low sum to the Latinos.

#### *'Compassion For The Plaintiffs'*

"I think they felt the police acted with cause," Richardson said. "I don't think the jury set out to punish the police department, but I think they felt some compassion for the plaintiffs, too, that they were deserving of some award."

Although Jennie Rivera sees the award as “a big step for us and for the Mexican community” and a vindication of “standing up for our rights,” Jerome Rivera, who received more than \$6,000 for civil rights abuses, false arrest and negligence, was not satisfied.

Now when a problem develops in his neighborhood, Rivera says, he will not bother to call the Riverside police for help.

“Whoever they send might be one of them (the convicted officers). By fighting for my rights I’m going to have to give up a few.”

And so the hard feelings continue to smolder. U.S. District Court Judge Mariana Pfaelzer said the jurors made no comment on the low monetary award when they returned 37 verdicts against Riverside police.

The judge did say, however, that if Riverside police are construing the sum to mean they had done nothing wrong, they are in error.

“If the jury found for the plaintiffs, they (Riverside police) certainly did something wrong,” the judge said. “But actually, it is improper for me to answer that kind of question.”

Renee Wong of Los Angeles, who served as jury for-man, said the jury had no idea the Latinos had sued for such a large sum in damages.

Roy Cazares, attorney for the plaintiffs, said he elected not to raise the issue of \$9.75 million in damages during the actual testimony because “I didn’t think we had proved that amount in damages.”

"We wanted the Riveras to get something for putting up with the case for five years. But we didn't see any strong evidence to tell us to give them a whole lot of money, either," Wong said.

*'We Thought They Were Wrong'*

At the same time, the jury wanted the Riverside police to know "we thought they were wrong, to slap their wrists, so to speak," she said.

The jury reached the point where members asked the judge for guidelines in awarding damages in the civil liberties suit, "but she sent back word to use our own good judgment," Wong said.

Deloris Lukens of Hemet, a member of the jury, said jurors did not have enough proof for an airtight case against police.

Juries traditionally make low awards in civil rights cases because they see the money as coming directly from taxpayers' pockets, Cazares said.

"Riverside police have a siege mentality when it comes to Casa Blanca," Cazares commented. "When you have that kind of fear, you will react to reinforce your stereotypes.

"That kind of thought process by rank-and-file police officers proceeds from the top down."

But no one will ever convince Deputy Chief Richardson that he or his officers overreacted in Casa Blanca that night.

Just two weeks after the events of Aug. 1, three officers and four civilians were injured in a violent outburst

in the barrio. One officer's eye was shot out and he was permanently retired from the force, Richardson said.

Of the Aug. 1 clash, Richardson concluded, "I felt we used the amount of force appropriate for the offenses under which the arrests were taking place.

"In this case, I believe everybody thinks they are telling the truth. I think the Riveras are honest in how they saw the events of Aug. 1. I also feel the police department is as honest.

"What we are talking about here are perceptual differences. They saw us as an undisciplined, unruly mob. We saw them the same way."

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(Caption omitted in printing)

No. CV 76-1803 MRP

# REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Partial)

PLACE: Los Angeles, California

DATE: Tuesday, October 7, 1980

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The entirety of this proceeding is reprinted at pages  
199-205 of this Joint Appendix

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## UCLA LAW

THE MAGAZINE OF THE UCLA SCHOOL OF LAW  
Vol. — No. 3 SPRING 1980

Washington Lawyering: UCLA  
Alumni in the Nation's Capitol

*The Faculty*

*Benjamin Aaron* has completed a chapter for the labor law volume of the *International Encyclopedia of Comparative Law* on settlement of labor disputes over rights. He also addressed the Administrative Law Judges Conference on "The Union's Duty of Fair Representation" in February. Professor Aaron is vice chairman and chairman-elect of the statewide Academic Senate and is editor-in-chief of the quarterly journal, *Comparative Labor Law*.

*Norman Abrams* authored a study, "Administrative process Alternatives to the Criminal Process," which was published by the National Center for Administrative Justice. His brief paper, "Some Observations on Basic Research on Administrative Procedure and the Idea of a Procedural Continuum" was published in an *Administrative Law Review* symposium.

At a conference on white collar crime at Temple University, he gave a paper on "White Collar Crime and the Federal Role in Law Enforcement," which will be published in the *Temple Law Review*. He also presented a paper on "The Liability of Corporate Officers for the Strict Liability Offenses of their Corporation—A Comment on Dotterweich and Park" at the Corporate Law Institute in New York.

Professor Abrams, who is teaching a new course on "Federal Criminal Law Enforcement" in which he is using



his own casebook materials, is on the steering committee of UCLA's Center for International and Strategic Affairs. This spring he is the center's acting co-director.

*Reginald Alleyne* recently published an article in *Hastings Law Journal* on the new collective bargaining law for California universities and colleges. Along with Joseph Grodin and Donald Wollett, Professor Alleyne edited a casebook on public sector collective bargaining published by the Bureau of National Affairs.

He addressed a conference of California Administrative Law Judges on arbitration and unfair labor practice remedies and was a seminar leader at a California School Employees Association conference on administrative practices before the California Public Employment Relations Board.

*Michael R. Asimow* has completed a study for the Administrative Conference of the United States on the separation (sic) of functions in federal administrative agencies.

He plans to study the functioning of English administrative agencies during his spring semester sabbatical.

*John A. Bauman* has been appointed executive director of American Law Schools, and will be on a two-year leave from the University to take up his duties in Washington, D.C.

*Helen Bendix* has completed work on *Supreme Court Practice and Jurisdiction* (with Moore and Ringle) to be published by Matthew Bender Company.

*Paul Bergman* is a faculty member for the 1980 AALS Clinical Teachers Conference to be held in Montana this



June. He has supervised the drafting of new problems for the 1980 experimental portion of the California bar exam to test the practical skills of the examinees. Bergman is also writing an article with the relationship between class action class representatives and attorneys for the class.

*David Binder* has developed an estate planning curriculum for the American Bar Association's pilot program on law office skills. He was an instructor on that subject for ABA pilot projects in Berkeley and Chicago.

Professor Binder also has published an *Instructor's Manual on Legal Interviewing and Counseling*.

*Grace Blumberg* has completed an article, "Adult Derivative Benefits in Social Security," to be published by the *Stanford Law Review*. She is currently writing on several aspects of unmarried cohabitation.

Professor Blumberg is serving on the advisory board and litigation subcommittee of the "ERA Impact Project" undertaken by the NOW Legal Defense and Education Fund and the Women's Law Project.

*Richard Delgado* delivered papers at New York University Law School and the New School for Social Research, and testified before two legislative committees on issues relating to religious movements and the law. His article, "Active Rationality in Judicial Review" appears as the lead article in the *Minnesota Law Review*.

The *New York Review of Law & Social Action* will publish a second article, "Religious Totalism as Slavery" and he has co-authored an article on medical malpractice with second-year law student Joan Vogel. Professor Del-

gado is now working on an article, "The Moralists As Expert Witness."

*George P. Fletcher* prepared a 500-page volume of case histories and legal analysis for the UCLA-hosted conference on "Soviet Jews Under Soviet Law," which is now available in law libraries around the country. He spent two weeks in the Soviet Union working on the Shecharansky case and later returned to Moscow on an academic exchange to present a paper on the "Presumption of Innocence in Soviet and America Law" at the Soviet Institute of State and Law. The institute's journal will publish a Russian translation of the paper.

Professor Fletcher also presented a paper on German approaches to the "taking" problem at the USC Conference on Comparative Constitutional Law. He will teach courses on criminal law and legal philosophy as a visiting professor at the University of Frankfurt this spring.

*Carole Goldberg-Ambrose* is serving as principal investigator of a University grant to produce a series of films on Indian Law.

She recently delivered a report on "Energy Mobilization and the Balance of Federal, State and Tribal Power", and plans to turn that research into several articles.

*Donald G. Hagman* will teach "Public Control of Land" at the University of Michigan this summer, hoping to use the recently completed second edition of his casebook on that subject.

The southern section of the American Planning Association recently honored Professor Hagman for his outstanding contributions to planning in this area.

*William A. Klein* has published *Business Organization and Finance: Legal and Economic Principles* with Foundation Press this year.

He is also participating in a new course called "Motion Picture Business Transactions," along with instructors Gary O. Concoff and David R. Ginsburg, both of Kaplan, Livingston, Goodwin, Berkowitz & Selvin.

*Wesley J. Liebler* recently published a review of Bork's *The Antitrust Paradox* and has completed a manuscript the antitrust activities of the FTC to published (sic) by Oxford University Press. He gave papers at the Western Economic Association, the American Economic Association, the Southwestern University Antitrust Symposium, and an antitrust symposium sponsored by the Law and Economics Center.

Professor Liebler is working on a paper on the implications of the GTE Sylvania case and a review of current antitrust problems for the Hoover Institute. He is also preparing an article on Friedman vs. Rogers (Texas) for the Law and Economics Center as well as a paper on the 1901 U.S. Steel merger for the Law and Economics Program at the University of Chicago.

*Gerald Lopez* is nearing completion of his article, "Undocumented Mexican Migration: In Search of a Just Immigration Law," and is researching the development of law surrounding Section 1983.

Professor Lopez was invited to deliver a lecture on "Civil Rights Litigation" at California's first Minority State Bar Convention. He has also been invited to testify before President Carter's Select Commission on Immigration and Refuge Policy.

*Daniel Lowenstein* is a member of the national governing board of Common Cause, and an active member of the campaign advisory committee of Californians for Smoking and No-Smoking Sections.

*Michael D. Rappaport* delivered a paper comparing minority and white placement patterns in the legal profession before the National Conference of . . .

#### AFFIDAVIT OF JONATHAN KOTLER

State of California, County of Los Angeles, ss.

I, JONATHAN KOTLER, being first duly sworn, depose and say:

1. I am an attorney at law in good standing with the State Bar of California duly licensed to practice in all of the courts of the State of California, and am attorney for the Defendants herein and by virtue of the foregoing, I have personal knowledge of and am competent to testify to and if called to testify would so testify to the following:

2. I have read both the Affidavit of Gerald P. Lopez and that of Roy B. Cazares re: request for attorneys fees, and since the legal arguments in opposition to their motion are contained in the Memorandum of Points and Authorities filed concurrently herewith, I will confine this affidavit to the subject matter of their affidavits.

3. Directing this Honorable Court's attention to paragraph 7 at page 4 of Mr. Lopez' affidavit, wherein Mr. Lopez refers in two separate places to the "litigious nature of defendants", your Affiant finds it hard to under-

stand how defendants can ever be litigious. If, as Mr. Lopez seems to indicate, he is referring to objections to discovery and witnesses, then your Affiant is content to rest on the record of this case wherein Mr. Lopez and his clients were precluded by court order from discovery which your Affiant, as attorney for Defendants herein objected to, and they eventually withdrew a myriad of exhibits and witnesses to which, likewise, your Affiant objected. Apparently, Mr. Lopez is taking the position that your Affiant has been litigious for doing those very things, which, if your Affiant hadn't done, your Affiant could be sued for malpractice by his very own clients.

4. In the same paragraph, Mr. Lopez states:

"Finally, and perhaps the best evidence of the litigious nature of defendants, the number of hours expended is great because defendants never once made a reasonable settlement offer."

5. To that dubious charge, your Affiant states that he is unaware of rule of law which would require him to respond to unreasonable settlement offers, the last one of which was for an amount nearly ten times the award eventually made by the jury herein. Further, what Mr. Lopez does not state (and perhaps, because he has not checked with Mr. Cazares) is that the last settlement offer made by your Affiant to the Plaintiffs herein, through Mr. Cazares, was for the sum of \$25,000.00. This amount was only eight thousand dollars away from the amount the jury eventually awarded, but it was rejected by Mr. Cazares who, apparently, anticipating a very large jury award herein, told your Affiant that he would be seeking attorneys fees in the sum of \$70,000.00 for Mr. Lopez and himself.



6. The aforesaid offer of \$25,000.00 was made prior to the jury coming back with its award herein, and while they were deliberating. Subsequent to the jury's findings herein, the attorneys for the Plaintiffs herein immediately forgot not only that the settlement offer was made, but have increased their demand for attorneys fees more than six-fold, although no other services were rendered by them (according to their own affidavits) between the time this offer was made and their demand for attorneys fees herein was filed, other than asking for fees for themselves.

7. As to the affidavit of Mr. Roy B. Cazares filed in an effort to get from this Honorable Court what the jury refused to give his clients, attention is drawn to paragraph 2 of said affidavit wherein Mr. Cazares apparently is under the belief that "counsel for defendants knew or should have known that expenses alone totaled nearly \$7,000.00" and on that basis should have increased the settlement offer made by your Affiant's clients.

8. What your Affiant cannot understand and cannot reconcile, is how your Affiant should have known that Mr. Cazares' expenses "alone totaled nearly \$7,000.00" when his very own affidavit filed in conjunction with his request for attorneys fees (Exhibit "C" to the Motion) shows expenses of \$4,038.51. Is this three thousand dollar difference merely an oversight on Mr. Cazares' part? Put another way, how can Mr. Cazares really expect that your Affiant "knew or should have known that expenses alone totaled nearly \$7,000.00" when his own belief and evidence is to the contrary?

9. And finally, as stated in your Affiant's own Motion for Attorneys Fees filed previously in this matter, and to

also be heard on January 19, 1981, your Affiant, who has a great deal more litigation experience than either of the opposing counsel in this matter, having been a trial lawyer, and having been involved in federal court litigation since 1971 (or nearly twice as long as either Mr. Lopez or Mr. Cazares) has throughout this entire action charged his clients the sum of \$50.00 per hour. The results herein show that at the sum of \$50.00 per hour your Affiant obtained approximately 10 times as many judgments for his clients as counsel for the Plaintiffs herein did for theirs, and yet they are seeking attorneys fees based on an hourly rate of up to \$300.00 per hour.

10. Executed at Beverly Hills, California, this 5th day of January, 1981.

/s/ Jonathan Kotler

Subscribed and sworn to before me, this 5th day of January, 1981.

/s/ Roger Franklin  
NOTARY PUBLIC IN AND FOR  
SAID COUNTY AND STATE  
My Commission Exp. Apr. 27, 1983

(Proof of service by mail omitted in printing)

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CAZARES & TOSDAL  
Attorneys at Law  
225 Broadway, Suite 1352  
San Diego, Ca 92101  
Telephone: (714) 233-6581  
Attorneys for Plaintiffs

(Caption omitted in printing)

NO. CV 76-1803-MRP

AFFIDAVIT OF ROBERT L. WINSLOW IN  
SUPPORT OF PLAINTIFFS' MOTION FOR  
REASONABLE ATTORNEYS FEES AND  
COSTS

ROBERT L. WINSLOW, first being duly sworn, deposes and says:

1. I am a partner and the co-chairman of the litigation department in the law firm of Irell & Manella. I am a 1949 graduate of Stanford Law School where I served on the Board of Editors of the Stanford Law Review. I was admitted to the California Bar in June 1949 and immediately began practice as a Deputy District Attorney in Mendocino County, California. In March of 1950, I left the District Attorney's office to become an individual and sole practitioner in Mendocino County. I operated my own law office until April 1961 when I was appointed to the Superior Court in Mendocino County. I served as a Superior Court Judge until January of 1969 when I joined the firm of Mitchell, Silberberg & Knupp in Los Angeles. I remained with that firm until September of 1972 when I joined the firm of Irell & Manella.

2. During the first ten years of my practice, I was a general practitioner operating a typical small office gen-



eral practice, including of course a wide range of litigation. During the next eight years of my professional life, I had the enriching experience of serving as a Superior Court Judge where, as a trial judge, I presided over a wide variety of trials, including commercial, domestic, criminal, personal injury and eminent domain trials. I tried several homicide cases as well as cases of minor significance. I also served on the faculty of a number of Judicial Council sponsored institutes and the faculty of the California College of Trial Judges. While at Michell, Silberberg & Knupp and in my current position at Irell & Manella I have been involved primarily in complex commercial litigation.

3. Recently, in a major consumer class action where I was chief counsel representing the plaineiff class, *Garrett v. Coast Federal Savings and Loan Association*, Los Angeles Superior Court No. C995634, I was involved in preparing and representing to the Court an application for attorneys' fees in that action for the successful plaintiffs' counsel. In connection with that action, and generally as a partner in a large commercial law firm. I have become familiar with the general criteria for fixing attorneys' fees and with the range of attorneys' billing rates charged by attorneys in Los Angeles County. Those billing rates range from \$50 an hour to \$250, depending upon the age, skill and experience of the particular attorney.

4. I have been informed that Gerald P. Lopez was graduated from Harvard Law School approximately seven years ago, that for over five years he has specialized in civil rights litigation, that he teaches a course on civil rights legislation (focusing on §1983) at the School of

Law at the University of California at Los Angeles, and that he researches and writes in the field of civil rights. It is my opinion that \$125 per hour is a reasonable hourly billing rate for a person of Mr. Lopez' background and experience.

5. I have been ingormed that Roy B. Cazares was graduated from Harvard Law School over seven years ago, that for seven years he has specialized in litigation, with the last five years devoted primarily to civil rights litigation, and that he has lectured on civil rights, constitutional law and police-community relations. It is my opinion that \$125 per hour is a reasonable hourly billing rate for a person of Mr. Cazares' background and experience.

6. By hourly billing rate I have been referring to the billing rates at which time is recorded by a law firm as work is being performed on a matter. This hourly billing rate only provides a guideline for a determination of a proper fee in a given matter. The reasonableness of a fee also depends upon the complexity of the issues involved in the matter, the experience in the particular field of the attorneys involved, the result achieved, the risk of an unfavorable result, whether the case was taken on a contingency basis and the vigor with which the case was litigated by both sides. These factors, in an appropriate case, might support a reasonable attorneys' fee significantly in excess of the reasonable hourly billing rate multiplied by the number of hours worked on a case.

7. The information contained herein is of my own personal knowledge, except as otherwise specified herein,

and if called as a witness in this matter I would be competent to testify to all of the above.

Dated: December 18, 1980

/s/ Robert W. Winslow

STATE OF CALIFORNIA       )  
                                  ) ss  
COUNTY OF LOS ANGELES )

SUBSCRIBED AND SWORN TO before me this  
18th day of December, 1980

/s/ MARCIA A. LEVIN

Notary Public  
My Commission expires June 21, 1982

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(Caption omitted in printing)

NO. CV 76-1803-MRP

**SUPPLEMENTAL AFFIDAVIT OF GERALD  
P. LOPEZ IN SUPPORT OF PLAINTIFFS'  
MOTION FOR REASONABLE ATTORNEYS  
FEES AND COSTS**

GERALD P. LOPEZ, being duly sworn, deposes and says:

1. I am co-counsel for the plaintiffs in the above-captioned action; I make this affidavit in order to bring to the Court's attention facts relevant to the amount of fees requested in the previously submitted Motion For Reasonable Attorneys Fees and Costs.

2. In my affidavit of December 1, 1980, I stated that as of that time, I had expended 1,265.50 hours on the prosecution of this case. Those hours were expended on the following days and activities:

|         |                                                                                                      |      |
|---------|------------------------------------------------------------------------------------------------------|------|
| 8/25/75 | Conference with Roy B. Cazares (Cazares) re results of trip to Riverside, potential causes of action | 2.00 |
| 8/28/75 | Review internal memo re initial investigation and preliminary research                               | 2.50 |
| 9/ 3/75 | Research absolute municipal immunity under Federal Civil Rights Act                                  | 3.50 |
| 9/11/75 | Research individual liability                                                                        | 2.50 |
| 9/16/75 | Research individual and municipal liability                                                          | 3.50 |
| 9/22/75 | Conference with Cazares re: Preliminary research                                                     | 2.50 |
| 9/26/75 | Prepare draft of retainer agreement                                                                  | 2.00 |
| 9/30/75 | Meet with Cazares re Theories of liability and what persons to represent                             | 1.50 |

|          |                                                                                                                     |      |
|----------|---------------------------------------------------------------------------------------------------------------------|------|
| 10/ 3/75 | Meet with clients to discuss strategy and explain specifics of retainer agreement                                   | 2.50 |
| 10/ 9/75 | Draft letter with retainer agreement and proposed steps                                                             | 2.50 |
| 10/11/75 | Telephone call with J. Rivera                                                                                       | .50  |
| 10/20/75 | Review letters from Jennie Rivera; note to file                                                                     | .50  |
| 10/23/75 | Research and prepare admin. complaints; meet with Cazares re same                                                   | 3.50 |
| 10/23/75 | Meet with J. Rivera and M. Flores re progress and new witnesses                                                     | 2.00 |
| 10/29/75 | Trip to Riverside to file administrative complaints, investigate, interview witnesses                               | 8.50 |
| 10/31/75 | Draft letter and claim against city to Larrabees                                                                    | 1.50 |
| 11/ 3/75 | Draft letter to Larrabee re retainer                                                                                | 1.00 |
| 11/ 5/75 | Research availability of Federal Equitable Relief preventing unconstitutional prosecution of various of our clients | 3.50 |
| 11/ 7/75 | Research availability of Federal Equitable Relief preventing unconstitutional prosecution of various of our clients | 2.00 |
| 11/11/75 | Research the Res Judicata effects of prior state criminal proceedings on subsequent Federal Civil Rights Claims     | 4.50 |
| 11/15/75 | Research the Res Judicata effects of prior state criminal proceedings on subsequent Federal Civil Rights Claims     | 3.50 |
| 11/20/75 | Conference with Cazares re findings of research                                                                     | 1.50 |
| 11/21/75 | Meeting with clients                                                                                                | 3.50 |

|          |                                                                                                                                  |      |
|----------|----------------------------------------------------------------------------------------------------------------------------------|------|
| 11/24/75 | Research effect of stipulation of probable cause accompanying dismissal of criminal prosecution                                  | 2.50 |
| 11/25/75 | Conference with Cazares re stipulation of probable cause and effect                                                              | 1.00 |
| 11/28/75 | Review letter from J. Rivera: notes to file                                                                                      | .50  |
| 12/15/75 | Draft receipt for 8 photographs requested by Barbara Beck, Riverside P.D.                                                        | 1.00 |
| 12/15/75 | Conversation with Cazares and clients re Riverside's rejection of client's claims                                                | 1.50 |
| 12/16/75 | Review letter from R.S. Paz and telephone call to same                                                                           | 1.00 |
| 12/24/75 | Review City of Riverside's rejection of clients' claims forwarded by clients with cover letter                                   | .50  |
| 1/ 7/76  | Research 1983 case law for claims against individuals                                                                            | 3.50 |
| 1/13/76  | Research Joint and Several liability under 1983                                                                                  | 3.00 |
| 1/14/76  | Research rationale and justification for John Doe practice in Ninth Circuit; alternatives in identifying unknown police officers | 3.50 |
| 1/14/76  | Conference with Cazares re John Does                                                                                             | 1.00 |
| 1/17/76  | Research choice of law of provisions 42 U.S.C. § 1988 and relevant cases                                                         | 4.00 |
| 1/28/76  | Meet with Cazares re Insurance Co. request for indemnity and note to file                                                        | .50  |
| 1/28/76  | Conversation with H. J. Fuller re Rivera insurance claim                                                                         | .50  |
| 1/28/76  | Research § 1981 and its potential application to individual defendants and City                                                  | 4.00 |



|         |                                                                                                                                      |      |
|---------|--------------------------------------------------------------------------------------------------------------------------------------|------|
| 2/ 2/76 | Review letter and information received from Jennie Rivera                                                                            | .50  |
| 2/ 5/76 | Research §§ 1985 and 1986 application to facts <i>particularly</i> unknown officer failing to prevent unlawful acts of others        | 3.00 |
| 2/ 7/76 | Research §§ 1985 and 1986 application to facts <i>particularly</i> unknown officer failing to prevent unlawful acts of others        | 3.50 |
| 2/12/76 | Research Prima Facie case of <i>Bivens</i> -like claim against City                                                                  | 2.50 |
| 2/18/76 | Meet with Cazares re <i>Bivens</i> -like claim                                                                                       | 1.50 |
| 2/20/76 | Further work on <i>Bivens</i> claim against City                                                                                     | 2.00 |
| 3/ 5/76 | Research state causes of action: False Arrest, Malicious Prosecution, Negligence                                                     | 3.50 |
| 3/ 9/76 | Research state causes of action: False Arrest, Malicious Prosecution, Negligence particularly negligence in training and supervision | 2.50 |
| 3/13/76 | Research likelihood of federal court abstention in view of pendent claims                                                            | 3.00 |
| 3/18/76 | Review personal injury literature for analogues to "Constitutional Torts": necessary proof, amounts of recovery, etc.                | 2.50 |
| 3/19/76 | Research case law re damages: proof necessary for various constitutional rights asserted                                             | 3.50 |
| 3/19/76 | Conference with Cazares re pendent state claims and proof of damages                                                                 | 2.00 |
| 3/22/76 | Letters to clients requesting additional specific information and suggesting                                                         |      |



|         |                                                                                                                                                                                        |      |
|---------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
|         | plan of procedure at end of criminal trial                                                                                                                                             | 2.50 |
| 3/29/76 | Conference with Cazares and Napoleon Jones re proof of psychological injury                                                                                                            | 1.50 |
| 3/31/76 | Conversation with Psychologist Audrey Weiss                                                                                                                                            | 2.00 |
| 4/ 1/76 | Letter to Riveras re appointments with Audrey Weiss; research re proof of emotional anxiety with respect to constitutional claims of due process First Amendment Rights                | 2.00 |
| 4/ 9/76 | Appointment with Jerome Rivera                                                                                                                                                         | 2.50 |
| 4/12/76 | Review letter from Jennie Rivera re chain of custody; research state statutory and common law immunities to various potential claim: any effect on federal claims?                     | 5.00 |
| 4/15/76 | Further research of state statutory and common law immunities and defenses                                                                                                             | 3.50 |
| 4/19/76 | Telephone conversation with and letter to Riveras re appointment for Donald with Weiss                                                                                                 | 1.00 |
| 4/24/76 | Research obstacles to systemic relief; hiring, training and supervision, community contact, administrative claims procedure, internal police misconduct procedures and related matters | 7.50 |
| 4/28/76 | Meet with Roy to discuss theories of case                                                                                                                                              | 2.50 |
| 4/29/76 | Letter to court requesting subpoenas                                                                                                                                                   | .50  |
| 5/ 5/76 | Letter to H.J. Fuller re insurance; notes to file                                                                                                                                      | .50  |
| 5/15/76 | Draft complaint                                                                                                                                                                        | 4.50 |
| 5/18/76 | Meet with Larrabees re case                                                                                                                                                            | 2.00 |

|         |                                                                                                                                                                                         |      |
|---------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 5/21/76 | Telephone call to Sam Paz re other witnesses and nature of our complaint                                                                                                                | .50  |
| 6/ 7/76 | Letter to District Court re: filing fee                                                                                                                                                 | .25  |
| 6/11/76 | Letter to insurance agent for Riveras                                                                                                                                                   | .25  |
| 6/14/76 | Letter to clients; review additional witness statements                                                                                                                                 | 2.00 |
| 6/16/76 | Meet with Cazares re discovery plan: interrogatories and depositions                                                                                                                    | 1.00 |
| 6/21/76 | Letter to process server                                                                                                                                                                | .25  |
| 6/23/76 | Letter to counsel (representing other plaintiffs) re discovery                                                                                                                          | .50  |
| 6/23/76 | Letter to U.S. District Court on proof of service                                                                                                                                       | .50  |
| 7/ 2/76 | Review answer to complaint                                                                                                                                                              | 2.50 |
| 7/ 6/76 | Receive and review Notice of Pre-Trial Conference; research various technical procedural issues                                                                                         | 1.50 |
| 7/ 7/76 | Telephone conversation with J. Ferguson's Clerk re Change of Caption                                                                                                                    | .50  |
| 7/ 9/76 | Stipulate re change of caption sent to opposing counsel, James Mead                                                                                                                     | 2.50 |
| 7/15/76 | Receive and review complaint # 76-1901-R to be low-numbered to J. Ferguson                                                                                                              | 1.50 |
| 7/16/76 | Letter to J. Ferguson re stipulation                                                                                                                                                    | .50  |
| 7/22/76 | Research history (compiled by Riverside citizen) of police-community relations in Riverside for possible use re: pattern and practice, acquiescence with knowledge, racial animas, etc. | 3.50 |
| 7/27/76 | Research history (compiled by Riverside citizen) of police-community relations in Riverside for possible use re:                                                                        |      |

|         |                                                                                                                                                       |      |
|---------|-------------------------------------------------------------------------------------------------------------------------------------------------------|------|
|         | pattern and practice, acquiescence with knowledge, racial animas, etc.: review                                                                        | 2.50 |
| 8/ 2/76 | Further research of significant police-community contact in or near Casablanca                                                                        | 3.00 |
| 8/10/76 | Research proof necessary for systemic relief: restructuring dept., Admin. Claims Procedures; Review <i>Rizzo</i> -libel cases                         | 3.50 |
| 8/12/76 | Research proof necessary for systemic relief: restructuring dept., Admin. claims procedures; Review <i>Rizzo</i> -libel cases                         | 2.00 |
| 8/18/76 | Further research newspaper account of police-Casablanca contact                                                                                       | 3.00 |
| 8/24/76 | Conference with Cazares re discovery with respect to police-community relations                                                                       | 1.50 |
| 8/27/76 | Research newspaper accounts: police Casablanca contact                                                                                                | 1.50 |
| 9/ 1/76 | Contact local San Diego police officers as "experts" re police handling of riots; police-community relations, etc.                                    | 2.00 |
| 9/ 7/76 | Investigate relationship of Riverside County P.A. and City of Riverside: Due Process Issues                                                           | 2.00 |
| 9/15/76 | Review cross-exam notes of criminal defense counsel                                                                                                   | 3.00 |
| 9/17/76 | Call J. Ferguson's Clerk to continue noticed pretrial conference                                                                                      | .25  |
| 9/20/76 | Research statutory and common law view of police reports: purpose? obligation of individual police officer? personal observation alone? group effort? | 2.50 |

|          |                                                                                                                                                       |      |
|----------|-------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 9/27/76  | Research statutory and common law view of police reports: purpose? obligation of individual police officer? personal observation alone? group effort? | 2.00 |
| 10/ 4/76 | Prepare for discovery with counsel for other group of plaintiffs                                                                                      | 2.50 |
| 10/ 8/76 | Prepare for discovery with counsel for other group of plaintiffs                                                                                      | 1.50 |
| 10/15/76 | Prepare "proof charts" and review notes on history; identification at scene; corroborating witnesses for meeting with other counsel                   | 2.50 |
| 10/15/76 | Confer with Cazares re scheduling of discovery, other matters                                                                                         | 1.50 |
| 10/17/76 | Meeting with Cazares and Paz                                                                                                                          | 2.50 |
| 10/25/76 | Confer with San Diego with insurance counsel re: typical settlement figures for alleged constitutional injury                                         | 1.50 |
| 10/29/76 | Review jury verdict awards                                                                                                                            | 1.50 |
| 11/ 3/76 | Review witness statements compiled immediately after the incident; read jury awards                                                                   | 2.50 |
| 11/11/76 | Review case law for evidence admissible in making out damages for constitutional deprivation                                                          | 3.50 |
| 11/12/76 | Review case law for evidence admissible in making out damages for constitutional deprivation                                                          | 3.00 |
| 11/16/76 | Prepare inter office notes re notice of deposition                                                                                                    | 2.00 |
| 11/29/76 | Further work for depositions                                                                                                                          | 1.50 |
| 11/29/76 | Letters to Riveras re depositions                                                                                                                     | 1.00 |
| 12/ 9/76 | Further work in preparation for deposition                                                                                                            | 2.00 |

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| 12/10/76 | Further work in preparation for deposition                                                    | 2.50 |
| 12/14/76 | Meet with Cazares re: my work in preparation for deposition                                   | 1.50 |
| 12/15/76 | Review information relevant to deposition of individual defendants: prepare notes for Cazares | 3.00 |
| 12/16/76 | Review information relevant to deposition of individual defendants; prepare notes for Cazares | 2.50 |
| 12/17/76 | Review information relevant to deposition of individual defendants; prepare notes for Cazares | 3.00 |
| 12/21/76 | Review information relevant to deposition of individual defendants; prepare notes for Cazares | 4.00 |
| 12/22/76 | Review information relevant to deposition of individual defendants: prepare notes for Cazares | 3.00 |
| 1/ 5/77  | Preparation of first set of interrogatories to be propounded to defendants                    | 6.00 |
| 1/ 6/77  | Meet with Cazares re upcoming depositions                                                     | 2.00 |
| 1/10/77  | Read and research defendant City of Riverside's 23 page motion to dismiss                     | 4.00 |
| 1/13/77  | Meet with Cazares re depositions; prepare notes re witnesses for future reference             | 2.00 |
| 1/15/77  | Research response to City of Riverside's motion to dismiss                                    | .50  |
| 1/18/77  | Review and sign stipulation to continue pre-trial conference                                  | .25  |
| 1/25/77  | Write draft of opposition to City's motion to dismiss                                         | 3.50 |

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| 1/26/77 | Review draft of opposition                                                                                               | 3.50 |
| 1/28/77 | Proof read opposition, final check of citations, draft letter to court for filing                                        | 3.00 |
| 1/30/77 | Read correspondence from Kotler re depositions and pretrial conference                                                   | .50  |
| 1/31/77 | Read defendants' interrogatories propounded to plaintiffs                                                                | 1.00 |
| 2/ 2/77 | Draft letter to clients re depositions and interrogatories                                                               | .50  |
| 2/ 4/77 | Read and research defendant City's supplemental memorandum in support of motion to dismiss: re <i>Aldinger v. Howard</i> | 2.50 |
| 2/ 4/77 | Read second separate (45 page) motion to dismiss filed by various individual defendants                                  | 3.00 |
| 2/ 5/77 | Work in preparation of plaintiffs' response to defendants' interrogatories                                               | 6.00 |
| 2/ 8/77 | Research case law cited by individual defendants in support of their separate motion to dismiss                          | 6.50 |
| 2/10/77 | Research case law cited in support of individual defendants separate motion to dismiss                                   | 3.50 |
| 2/14/77 | Research individual defendants motion to dismiss: Our argument re elements of prima facie § 1983 claim                   | 3.50 |
| 2/15/77 | Work in preparation of plaintiffs' response to defendants' interrogatories                                               | 3.00 |
| 2/15/77 | Confer with Cazares re plaintiffs' response to defendants' interrogatories                                               | 1.50 |
| 2/22/77 | Read letter from Sam Paz                                                                                                 | .25  |



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| 2/23/77 | Research availability of state statutory immunities raised by individual defendants in their motion to dismiss as complete bar to 1983, etc., claims            | 4.00 |
| 2/24/77 | Draft letter to Samuel Paz re continuing defendants' motion to dismiss                                                                                          | .25  |
| 3/ 3/77 | Draft points and authorities in opposition to individual defendants' motion to dismiss                                                                          | 4.00 |
| 3/ 8/77 | Further preparation of first set of interrogatories to be propounded to defendants                                                                              | 3.00 |
| 3/10/77 | Work in preparation of plaintiffs response to defendants' interrogatories                                                                                       | 7.00 |
| 3/14/77 | Preparation and argument re motion to dismiss                                                                                                                   | 6.50 |
| 3/15/77 | Read and research defendant City's 18 page reply to points and authorities in opposition to defendant City's motion to dismiss: Bivens analogue applied to City | 3.00 |
| 3/16/77 | Research City's reply to our opposing points and authorities                                                                                                    | 2.50 |
| 3/18/77 | Draft letter to Sue Reeves, reporter, re corrections of depositions                                                                                             | .25  |
| 3/24/77 | Read and research individual defendants reply to points and authorities in opposition to individual defendants' motion to dismiss                               | 2.50 |
| 3/25/77 | Draft argument in response to individual defendants reply to points and authorities in opposition to individual defendants' motion to dismiss                   | 3.00 |
| 3/27/77 | Prepare for argument on motion of City of Riverside                                                                                                             | 3.50 |



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| 3/28/77 | Preparation and argument re motion of City of Riverside to dismiss; post-argument notes and notes re discovery strategy            | 8.00 |
| 3/29/77 | Read Kotler's letter re our response to interrogatories propounded 1/28/77. Review interrogatories in question                     | 2.50 |
| 3/31/77 | Prepare order and accompanying letter denying each and every motion to dismiss brought by defendant City and individual defendants | 1.00 |
| 4/ 1/77 | Final work on plaintiffs interrogatories to defendants                                                                             | 3.50 |
| 4/ 1/77 | Draft motion to produce for inspection and copying of documents                                                                    | 1.00 |
| 4/ 6/77 | Draft letter to court re filing of interrogatories and motion to produce for inspection                                            | .75  |
| 4/ 6/77 | Draft letter to Ron & Mark Larrabee re interrogatories                                                                             | .25  |
| 4/ 7/77 | Review defendants second set of (414) interrogatories to each and every plaintiff (received 4/5/77)                                | 3.00 |
| 4/11/77 | Work on plaintiffs' response to defendants' second set of interrogatories                                                          | 3.50 |
| 4/14/77 | Review defendants 35 page motion to require further answers to first set of interrogatories                                        | 3.00 |
| 4/15/77 | Further work on plaintiff's responses to defendants' second set of interrogatories                                                 | .50  |
| 4/18/77 | Conference with Cazares re defendants' discovery tactics and oppressive interrogatories                                            | .50  |
| 4/18/77 | Work on motion for a protective order                                                                                              | 2.50 |

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| 4/21/77 | Draft letter to court clerk re Larrabee interrogatories                                                                                     | .25  |
| 4/22/77 | Prepare application for a protective order                                                                                                  | 2.00 |
| 4/25/77 | Prepare application for protective order                                                                                                    | 2.50 |
| 5/ 5/77 | Draft plaintiffs' memo of points and authorities in opposition to defendants' motion to compel                                              | 3.50 |
| 5/ 6/77 | Review defendants response in opposition to plaintiffs' motion to produce for inspection and copying                                        | .50  |
| 5/ 9/77 | Read Kotler's letter re conference                                                                                                          | .25  |
| 5/11/77 | Review defendants' points and authorities in opposition to plaintiffs' motion for a protective order                                        | 1.50 |
| 5/16/77 | Preparation for and hearing re motion to require further answers and motion for protective order; review stipulation and order re discovery | 5.00 |
| 5/24/77 | Work on plaintiffs' response to defendants' second set of (414 x 8) interrogatories                                                         | 3.00 |
| 5/25/77 | Review Kotler's letter re date for defendants' to respond to interrogatories                                                                | .25  |
| 6/ 2/77 | Draft letter to Larrabee preparing Mark for deposition                                                                                      | 1.50 |
| 6/ 3/77 | Draft letter to Kotler in response to letter of 5/23/77 re discovery                                                                        | .75  |
| 6/ 9/77 | Review Kotler letter dated June 8 re agreement on discovery                                                                                 | .25  |
| 6/17/77 | Preparation for, travel and deposition of Mark Larrabee in Los Angeles                                                                      | 7.00 |
| 6/19/77 | Work on motion to require further answers and to compel production of doc-                                                                  |      |

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|         | uments: deliberately ignored discovery stated and asserted such objections as "hearsay and inadmissibility or evidence; objected to terminology as "unintelligible" when the term (" <i>neighborhood problem</i> ") was employed by defendants <i>not</i> plaintiffs; deliberately avoiding subparts to questions; asserting attorney-client privilege without even attempting to demonstrate that privilege exists and applies; refuse production of documents through blanket assertions of irrelevance and work-product rule | 7.50 |
| 6/21/77 | Work on motion to require further answers and to compel production of documents: etc. (see 6/19/77)                                                                                                                                                                                                                                                                                                                                                                                                                             | 5.50 |
| 6/23/77 | Work on motion to require further answers and to compel production of documents: etc. (see 6/19/77)                                                                                                                                                                                                                                                                                                                                                                                                                             | 4.50 |
| 6/28/77 | Telephone conversation with Kristin Belko re Two week extension on discovery for both sides                                                                                                                                                                                                                                                                                                                                                                                                                                     | .25  |
| 6/30/77 | Review Belko's follow up letter                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | .25  |
| 6/30/77 | Continue work on plaintiffs' response to defendants' second set of interogs.                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 5.50 |
| 7/ 1/77 | Continue work on plaintiffs' response to defendants' (414 x 8) second set of interrogatories                                                                                                                                                                                                                                                                                                                                                                                                                                    | 4.50 |
| 7/ 2/77 | Continue work on plaintiffs' response to defendants' (414 x 8) second set of interrogatories                                                                                                                                                                                                                                                                                                                                                                                                                                    | 3.00 |
| 7/ 3/77 | Continue work on plaintiffs' response to defendants' (414 x 8) second set of interrogatories                                                                                                                                                                                                                                                                                                                                                                                                                                    | 6.00 |
| 7/ 5/77 | Continue work on plaintiffs' response to defendants' (414 x 8) second set of interrogatories                                                                                                                                                                                                                                                                                                                                                                                                                                    | 4.00 |

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| 7/ 6/77 | Continue work on plaintiffs' response to defendants' (414 x 8) second set of interrogatories                                                            | 3.50 |
| 7/12/77 | Draft letter to Larabee's re deposition                                                                                                                 | .25  |
| 7/21/77 | Draft letter to Larabees on response to second set of interrogatories propounded by defendants                                                          | .25  |
| 7/21/77 | Draft letter to L. Rivera                                                                                                                               | .25  |
| 7/21/77 | Review defendants 58 page memo of points and authorities in opposition to plaintiffs' motion to compel                                                  | 4.50 |
| 7/25/77 | Review defendant City of Riverside's response to plaintiffs' interrogatories                                                                            | 2.50 |
| 7/27/77 | Research objections (unsupported) interposed by City to plaintiffs' interros.                                                                           | 3.50 |
| 7/28/77 | Research various positions asserted (but unexplained and unsupported) by defendants in their 58 page memo in opposition to plaintiffs' motion to compel | 5.00 |
| 8/ 3/77 | Draft letter to U.S. District Court re: verifications                                                                                                   | .25  |
| 8/ 3/77 | Research motion to require further answer of City to plaintiffs' interrogatories                                                                        | 4.50 |
| 8/ 5/77 | Review defendants' motion for summary judgment, 23 affidavits                                                                                           | 2.00 |
| 8/ 6/77 | Draft motion to require further answers of City of Riverside. To be heard 9/12/77                                                                       | 3.00 |
| 8/ 8/77 | Further research individual defendants' positions in opposition to plaintiffs' motion to compel                                                         | 3.50 |
| 8/10/77 | Letter to J. Rivera re: updated witness list                                                                                                            | .25  |

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| 8/11/77 | Research defendants' motion for summary judgment                                                                                                                                                                   | 4.50 |
| 8/16/77 | Conversation with Kotler re plaintiffs' answer to interrogatories and other discovery                                                                                                                              | .25  |
| 8/18/77 | Work on opposition to defendant's motion for summary judgment                                                                                                                                                      | 3.00 |
| 8/19/77 | Confer with Cazares re opposition to summary judgment                                                                                                                                                              | 1.00 |
| 8/25/77 | Research and draft reply memorandum in support of motion to compel                                                                                                                                                 | 2.50 |
| 8/26/77 | Research and draft reply memorandum in support of motion to compel                                                                                                                                                 | 3.00 |
| 8/29/77 | Draft letter to H. J. Fuller re insurance claim                                                                                                                                                                    | .25  |
| 8/31/77 | Draft letter to court                                                                                                                                                                                              | .25  |
| 8/31/77 | Work on opposition to defendants' motion for summary judgment                                                                                                                                                      | 2.00 |
| 9/ 2/77 | Work on stipulation regarding issues remaining to be determined re plaintiffs' motion to compel                                                                                                                    | 4.00 |
| 9/ 6/77 | Draft letter accompanying stipulation re issues re motion to compel discovery                                                                                                                                      | .25  |
| 9/ 6/77 | Draft opposition to defendants' motion for summary judgment and statement of genuine issues                                                                                                                        | 4.00 |
| 9/ 7/77 | Draft statement of genuine issues in compliance with local rules                                                                                                                                                   | 3.00 |
| 9/12/77 | Preparation for and oral argument re motion to compel and review defendants' response to plaintiffs' reply memo; further work (post hearing) in discovery and opposition to summary judgment and things to be done | 8.00 |

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| 9/18/77  | Research and draft supplemental points and authorities in opposition to defendants' motion for summary judgment                      | 2.00 |
| 9/22/77  | Review City's opposition to plaintiffs' motion to compel further answers                                                             | 2.00 |
| 9/23/77  | Draft letter to Kotler re authorizations of J. Rivera and L. Rivera                                                                  | .25  |
| 9/23/77  | Review defendants' reply to points and authorities in opposition to motion for summary judgment                                      | 2.00 |
| 9/25/77  | Research City's opposition to plaintiffs' motion to compel                                                                           | 3.50 |
| 9/25/77  | Research City's opposition to plaintiffs' motion to compel                                                                           | 3.50 |
| 9/25/77  | Prepare for hearing—research City's new opposition                                                                                   | 2.00 |
| 9/26/77  | Hearing (preparation and argument) re motions                                                                                        | 7.00 |
| 9/27/77  | Draft affidavits for second opposition to defendants' additional affidavits                                                          | 4.50 |
| 9/28/77  | Further work on affidavits; research further points and authorities and draft further opposing points and authorities                | 7.00 |
| 9/29/77  | Confer with Cazares re all outstanding motions                                                                                       | 3.00 |
| 9/30/77  | Draft letter to Larabee re Mark's affidavit                                                                                          | .25  |
| 9/30/77  | Review supplemental affidavits in support of summary judgment                                                                        | .50  |
| 9/30/77  | Final work on stipulation re 7 issues remaining to be determined with regard to plaintiffs' motion to compel production of documents | 2.00 |
| 10/ 3/77 | Research and draft stipulation re issues with regard to plaintiffs' motion                                                           |      |



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|          | to compel further answers to defendant City of Riverside                                                                                                                                           | 6.00 |
| 10/ 5/77 | Review letter and stipulation from Kotler                                                                                                                                                          | .25  |
| 10/ 5/77 | Review letter from notary in Riverside side                                                                                                                                                        | .25  |
| 10/13/77 | Review defendants' response to plaintiffs' points and authorities in response to defendants' second set of affidavits                                                                              | 2.50 |
| 10/14/77 | Research for summary judgment argument                                                                                                                                                             | 3.00 |
| 10/14/77 | Review all discovery and all affidavits re motion for summary judgment                                                                                                                             | 7.00 |
| 10/15/77 | Preparation for oral argument                                                                                                                                                                      | 3.50 |
| 10/16/77 | Preparation for oral argument on 10/17                                                                                                                                                             | 4.00 |
| 10/17/77 | Preparation for and argument re plaintiffs' motion to compel further answers of City and defendants' motions for summary judgment; further work post argument re additional discovery and strategy | 8.00 |
| 11/ 7/77 | Review defendants' motion to compel further answers to defendants' second set of interrogatories                                                                                                   | 2.50 |
| 11/15/77 | Review affidavit submitted by defendants' in response to motion to require further answer; research claim by defendants                                                                            | 2.50 |
| 11/14/77 | Draft final stipulation re motion to require further answer of City pursuant to oral agreement in court on 10/17/77                                                                                | 2.50 |
| 11/17/77 | Draft letter to court with accompanying stipulation re motion to compel further answer of City                                                                                                     | 2.00 |



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| 11/17/77 | Review defendants' motion to compel further answer to defendants' second set of interrogatories                                                                                        | 2.00  |
| 11/30/77 | Read letter from Kotler re authorizations                                                                                                                                              | .25   |
| 12/ 2/77 | Read letter from Kotler re stipulation                                                                                                                                                 | .25   |
| 12/ 8/77 | Draft letter to Kotler and Belko re meeting re stipulation                                                                                                                             | .25   |
| 12/ 8/77 | Draft plaintiffs' opposition to defendants' motion to compel further answers to defendants' second set of interrogatories                                                              | 4.50  |
| 12/19/77 | Preparation for and work on stipulation re issues remaining to be determined with respect to defendant's motion to compel further answers to defendants' second set of interrogatories | 3.00  |
| 1/ 9/78  | Preparation for an argument in hearing re defendants motion to compel; work on further discovery                                                                                       | 7.00  |
| 1/24/78  | Draft letter to Kotler re documents requested in motion to produce                                                                                                                     | .25   |
| 1/24/78  | Review taxing of costs filed by Kotler; call court clerk; research challenge                                                                                                           | 3.50  |
| 1/25/78  | Research motion pursuant to rule 54(d) Fed. R. Civ. P.                                                                                                                                 | 3.00  |
| 1/26/78  | Research recently decided cases; conference with Cazares                                                                                                                               | 5.00  |
| 1/30/78  | Research legislative history                                                                                                                                                           | 6.00  |
| 1/31/78  | Draft motion                                                                                                                                                                           | 2.50  |
| 2/ 3/78  | Interview witnesses in Riverside                                                                                                                                                       | 10.00 |
| 2/ 6/78  | Draft letter to J. Rivera re witnesses and newspaper clippings                                                                                                                         | .25   |

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| 2/ 7/78 | Review letter for Kotler re taxing of costs                                                          | .25  |
| 2/ 9/78 | Confer with Cazares re possible expert testimony                                                     | 1.00 |
| 2/ 9/78 | Draft letter to Professor Mirande as expert witness                                                  | .50  |
| 2/13/78 | Review court's order re plaintiffs motion to compel research courts view of <i>Rizzo</i>             | 3.50 |
| 2/27/78 | Confer with Cazares re upcoming depositions                                                          | 1.00 |
| 3/ 1/78 | Review defendants' response to motion objecting to the imposition and taxing of costs                | 1.00 |
| 3/ 5/78 | Prepare for argument                                                                                 | 2.50 |
| 3/ 6/78 | Preparation for argument re plaintiffs' motion re taxing of costs—granted; further work on discovery | 7.00 |
| 3/ 9/78 | Preparation of order and accompanying letter to court                                                | 1.00 |
| 3/10/78 | Work on plaintiffs' response to defendants second set of interrogatories (as amended by court)       | 3.50 |
| 3/21/78 | Research: police-community relations: prototype vis a vis Riverside re proof and injunctive relief   | 3.50 |
| 3/22/78 | Research: police-community relations: prototype vis a vis Riverside re proof and injunctive relief   | 4.00 |
| 3/27/78 | Letters to J. Rivera, et al., re plaintiffs' response                                                | .50  |
| 4/ 4/78 | Review defendant City's further answers to interrogatories                                           | .50  |

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| 4/ 7/78 | Review Plaitt, Smith, Eltringham, Olsen, Brading, et al., further answers to interrogatories; compare with existing information for accuracy                                             | 3.50 |
| 4/ 8/78 | Prepare notes for deposition and further discovery of various individual defendants                                                                                                      | 6.00 |
| 4/19/78 | Confer with Cazares re Pattern and Practice of City of Riverside                                                                                                                         | 1.00 |
| 4/10/78 | Draft further interroatories to defendant City, Research <i>Rizzo</i> -like discovery                                                                                                    | 4.50 |
| 5/ 2/18 | Draft letter to Kotler re inadequacy of individual defendants responses to interrogatories                                                                                               | 3.00 |
| 5/ 3/78 | Served with Civil Complaint for malicious prosecution filed by Kotler on behalf of dismissed defendants naming clients and ourselves as defendants; research and conference with Cazares | 3.50 |
| 5/ 4/78 | Letter to Kotler re missing items ordered by Court                                                                                                                                       | .50  |
| 5/ 5/78 | Telephone conference with Kotler re 5/2/ information                                                                                                                                     | .50  |
| 5/ 5/78 | Draft follow-up letter to Kotler                                                                                                                                                         | .25  |
| 5/ 5/78 | Research federal removal provisions                                                                                                                                                      | 3.50 |
| 5/ 6/78 | Review court ordered further answers and reports                                                                                                                                         | 5.00 |
| 5/ 8/78 | Read Kotler's letter re telephone conference                                                                                                                                             | .25  |
| 5/ 8/78 | Research federal removal provisions; relevant case law                                                                                                                                   | 4.50 |
| 5/13/78 | Research removal provisions, relevant case law                                                                                                                                           | 5.00 |

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| 5/15/78 | Conference with Cazares re removal and and motion to dismiss and motion for summary judgment                                                   | 2.00 |
| 5/16/78 | Draft removal petition and affidavits; prepare bond                                                                                            | 3.00 |
| 5/18/78 | Review Kotler's letter re possible stipulation                                                                                                 | .25  |
| 5/19/78 | Research Motion to Dismiss/Motion for summary judgment of removal successful                                                                   | 7.00 |
| 5/23/78 | Draft motion to dismiss/motion re summary judgment and affidavit                                                                               | 4.50 |
| 5/23/78 | Discuss removal with clients                                                                                                                   | 1.50 |
| 5/24/78 | Discuss removal with clients                                                                                                                   | 1.50 |
| 5/25/78 | Final work on motion to dismiss/motion for summary judgment                                                                                    | 3.00 |
| 5/31/78 | Discuss motions with clients                                                                                                                   | 2.50 |
| 5/31/78 | Review Kotler letter "Line Memos" of individual defendants                                                                                     | 1.00 |
| 6/ 6/78 | Review motion to remand; research                                                                                                              | 1.50 |
| 6/ 7/78 | Research and draft points and authorities in opposition to motion to remand                                                                    | 3.50 |
| 6/13/78 | Draft letter to court accompanying opposition to motion to remand                                                                              | .25  |
| 6/16/78 | Review response to motion for summary judgment; research case law cited; review affidavits, filed                                              | 4.50 |
| 6/17/78 | Review response to motion for summary judgment; research case law cited; review affidavits; compare with affidavits filed in support of motion | 6.00 |
| 6/23/78 | Review defendants' response to opposition to defendants motion to remand; note defendants' use of <i>Sweeney</i>                               | 1.00 |

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| 7/10/78 | Review individual defendants' supplemental answers to interrogatories and City's supplemental further answer                                                          | 3.00 |
| 7/11/78 | Review individual defendants' supplemental answers to interrogatories and City's supplemental further answers and prepare questions and items of additional discovery | 4.50 |
| 7/14/78 | Read and study defendant City's answers to second set of interrogatories                                                                                              | 2.50 |
| 7/15/78 | Read and study defendant City's answers to second set of interrogatories                                                                                              | 3.50 |
| 8/ 8/78 | Review individual defendants' answers to second set of interrogatories; notes for further discovery                                                                   | 5.00 |
| 8/ 9/78 | Review individual defendants' answers to second set of interrogatories; notes for further discovery                                                                   | 4.50 |
| 8/ 9/78 | Draft request for production of documents and motion to compel further answer of Chief Ferguson and City of Riverside                                                 | 2.75 |
| 8/10/78 | Confer with Cazares re further discovery: review discovery to date, further needs, etc.                                                                               | 2.00 |
| 8/16/78 | Review Kotler's letter re supplemental answers of defendant City                                                                                                      | .25  |
| 8/16/78 | Review: compare & contrast all defendants' responses re: unfolding events with respect to probable cause and other relevant facts                                     | 6.50 |
| 8/17/78 | Review: compare and contrast all defendants' responses re: unfolding events with respect to probable cause and other relevant facts                                   | 5.00 |

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| 8/18/78 | Review: compare and contrast all defendants' responses re: unfolding events with respect to probable cause and other relevant facts                  | 3.00 |
| 8/19/78 | Prepare for motion to remand/motion for summary judgment hearing                                                                                     | 5.00 |
| 8/20/78 | Prepare for hearing; review notes and case law                                                                                                       | 4.50 |
| 8/21/78 | Preparation and argument, prepare order                                                                                                              | 4.00 |
| 8/22/78 | Review all documents relevant to Olsen deposition: notes for Cazares                                                                                 | 3.00 |
| 8/28/78 | Review defendant Ferguson's answers to second set of interrogatories; further questions and compare with responses of others                         | 2.50 |
| 9/ 5/78 | Review City's response to interrogatory No. 28: operational plan-Casablanca                                                                          | 3.00 |
| 9/ 6/78 | Research typicality of such operational plans re: proof and equitable relief                                                                         | 4.50 |
| 9/18/78 | Review Kotler letter re PTC; conversation with Cazares                                                                                               | 2.50 |
| 9/19/78 | Review defendants' motion to amend order                                                                                                             | 1.50 |
| 9/25/78 | Preparation for and argument re defendants' motion to amend order; discussion with Kotler re deposition of Chief Ferguson; further work on discovery | 4.50 |
| 9/26/78 | Draft order denying motion to amend previous order and accompanying letter                                                                           | .50  |
| 9/26/78 | Review and prepare notes for Cazares re Eltringham deposition                                                                                        | 2.50 |



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| 11/27/78 | Review documents, all discovery and witness statements relevant to depositions of Innskeep and Webster: Notes to Cazares | 3.00 |
| 11/28/78 | Review documents, all discovery and witness statements relevant to depositions of Innskeep and Webster: notes to Cazares | 2.00 |
| 11/30/78 | Review documents, discovery and statements re defendant Smith: notes to Cazares                                          | 1.00 |
| 12/ 1/78 | Investigative trip to Riverside: meet with witnesses                                                                     | 7.00 |
| 12/ 2/78 | Investigative trip to Riverside: meet with witnesses                                                                     | 4.50 |
| 12/11/78 | Conversation with Cazares re depositions                                                                                 | .50  |
| 12/14/78 | Review relevant documents, discovery, statements Police Manual re Ferguson deposition: notes to Cazares                  | 3.00 |
| 12/15/78 | Review relevant documents, discovery, statements Police Manual re Fergusson deposition: notes to Cazares                 | 3.50 |
| 1/ 8/79  | Research contentions of law and instructions                                                                             | 2.00 |
| 1/11/79  | Research contentions of law and instructions                                                                             | 2.50 |
| 1/12/79  | Research contentions of law and instructions                                                                             | 2.00 |
| 1/13/79  | Research contentions of law and instructions                                                                             | 3.50 |
| 1/18/78  | Research tear gas grenades: expert                                                                                       | 2.50 |
| 1/22/79  | Telephone conversation with Cazares                                                                                      | .25  |
| 1/23/79  | Work on pre trial order and memo of contentions of fact and law                                                          | 4.00 |



|          |                                                                                                                                         |      |
|----------|-----------------------------------------------------------------------------------------------------------------------------------------|------|
| 1/24/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 5.00 |
| 1/25/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 4.00 |
| 1/26/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 5.00 |
| 1/27/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 7.00 |
| 1/28/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 3.00 |
| 1/29/78  | Work on pretrial order and memo of contentions of fact and law                                                                          | 6.00 |
| 1/30/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 6.75 |
| 1/31/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 7.00 |
| 2/ 1/79  | Meet with Cazares in preparation for meeting with Kotler; work on preparation of pretrial order and memo of contentions of fact and law | 5.00 |
| 2/ 2/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 4.50 |
| 2/ 3/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 5.75 |
| 2/ 4/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 4.25 |
| 2/ 5/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 7.00 |
| 2/ 6/79  | Work on pretrial order and memo of contentions of fact and law                                                                          | 6.50 |
| 2/20/79  | Preparation for hearing on 2/26                                                                                                         | 3.00 |
| 2/26/79  | Preparation for and pretrial conference                                                                                                 | 5.00 |
| 3/ 7/ 79 | Study discovery and witnesses statement for trial notes and organization                                                                | 3.00 |

|         |                                                                                |      |
|---------|--------------------------------------------------------------------------------|------|
| 3/10/79 | Study discovery and witnesses statement for trial notes and organization       | 4.50 |
| 3/12/79 | Review defendants objections to plaintiffs' issue to be litigated at trial     | 2.00 |
| 3/14/79 | Review defendants objections to plaintiffs' issue to be litigated at trial     | 1.00 |
| 3/14/79 | Research: all recent Circuit Cases or LEXIS                                    | 5.00 |
| 3/15/79 | Research all Circuit cases                                                     | 3.50 |
| 3/18/79 | Research all Circuit cases plaintiffs' Supplemental Memo of Law                | 4.50 |
| 3/19/79 | Further research; draft supplemental memorandum of law                         | 5.00 |
| 3/20/79 | Draft supplemental memorandum of law                                           | 3.00 |
| 3/23/79 | Work re witnesses (friends and police officers) necessary for prima facie case | 2.00 |
| 4/ 5/79 | Review defendants' response to plaintiffs' supplemental memo of law            | 1.50 |
| 4/ 6/79 | Review Kotler affidavit                                                        | .50  |
| 4/ 7/79 | Preparation for 4/9 hearing                                                    | 3.00 |
| 4/ 8/79 | Preparation for 4/9 hearing                                                    | 3.50 |
| 4/ 9/79 | Preparation for and hearing before Court                                       | 5.50 |
| 4/12/79 | Preparation for hearing 4/16                                                   | 3.00 |
| 4/14/79 | Preparation for hearing 4/16                                                   | 4.00 |
| 4/16/79 | Preparation for and hearing before Court                                       | 5.00 |
| 4/18/79 | Research for second supplemental memo of law                                   | 3.50 |
| 4/20/79 | Research for second supplemental memo of law                                   | 3.00 |

|         |                                                                                                 |      |
|---------|-------------------------------------------------------------------------------------------------|------|
| 4/21/79 | Research for second supplemental memo of law                                                    | 3.00 |
| 4/23/79 | Research for second supplemental memo of law and first draft of second supplemental memo of law | 5.00 |
| 4/24/79 | Complete writing of plaintiffs' second supplemental memo of law                                 | 5.00 |
| 4/26/79 | Prepare litigation charts for trial                                                             | 3.50 |
| 4/28/79 | Prepare litigation charts for trial                                                             | 2.00 |
| 5/ 2/79 | Review discovery re all defendants' inconsistencies relevant to prima facie case and defense    | 3.50 |
| 5/ 3/79 | Review discovery re all defendants' inconsistencies relevant to prima facie case and defense    | 4.00 |
| 5/ 4/79 | Review discovery re all defendants' inconsistencies relevant to prima facie case and defense    | 2.00 |
| 5/ 9/79 | Read recent case law re proof                                                                   | 3.00 |
| 5/16/79 | Review defendants' response to plaintiffs' second supplemental memo law; research               | 2.00 |
| 5/21/79 | Research defendants' response                                                                   | 4.00 |
| 5/24/79 | Review defendants' motion to dismiss for failure to prosecute                                   | 1.50 |
| 6/15/79 | Draft affidavit in opposition to defendants' motion to dismiss, meet with co-counsel re case    | 3.00 |
| 6/26/79 | Review affidavit of Kotler in support of motion to dismiss                                      | .50  |
| 7/ 9/79 | Research for defendants' appeal of dismissal                                                    | 3.50 |
| 7/10/79 | Draft appellee brief                                                                            | 2.50 |

|          |                                                                                                             |      |
|----------|-------------------------------------------------------------------------------------------------------------|------|
| 7/16/79  | Review defendants' objection to modified plaintiffs' exhibit list                                           | .50  |
| 10/19/79 | Telephone conference with Cazares re settlement conference                                                  | .50  |
| 12/13/79 | Preparation for and conference with Cazares reviewing entire case for trial                                 | 6.00 |
| 12/17/79 | Review witnesses statement: notes and elements of claims                                                    | 2.00 |
| 12/19/79 | Review witnesses statement: notes and elements of claims                                                    | 2.50 |
| 2/ 4/80  | Conference with Cazares re status conference                                                                | 1.00 |
| 2/14/80  | Research use of statistical data provided by defendant City re pattern and practice/or 1985 and 1986 claims | 3.00 |
| 2/15/80  | Research use of statistical data provided by defendant City re pattern and practice/or 1985 and 1986 claims | 2.50 |
| 2/20/80  | Draft supplemental memo of contentions of law                                                               | 1.50 |
| 3/ 4/80  | Review and revise chart of prima facie cases                                                                | 2.50 |
| 3/ 6/80  | Review and revise chart of prima facie cases                                                                | 2.00 |
| 3/ 7/80  | Review witnesses' statements re elements of claim/defense                                                   | 3.00 |
| 3/ 8/80  | Preparation for and conference with Cazares in Los Angeles: trial preparation                               | 4.50 |
| 3/11/80  | Research for jury instructions                                                                              | 4.00 |
| 3/13/80  | Research for jury instructions                                                                              | 3.00 |
| 3/14/80  | Research for jury instructions                                                                              | 3.50 |
| 3/18/80  | Draft jury instructions                                                                                     | 3.00 |

|         |                                                                                                               |      |
|---------|---------------------------------------------------------------------------------------------------------------|------|
| 3/19/80 | Draft jury instructions                                                                                       | 3.50 |
| 3/21/80 | Informed that trial re-set for 6/30/80/<br>telephone                                                          | .25  |
| 4/18/80 | Work on instructions; joint and sev-<br>eral liability concept—res ipsa and<br>other burden shifting concepts | 2.00 |
| 4/22/80 | Work on instructions; joint and several<br>liability concept—res ipsa and other bur-<br>den shifting concepts | 3.00 |
| 4/30/80 | Review police operating manual re vio-<br>lations: notes to file                                              | 2.00 |
| 5/ 1/80 | Research and draft instructions                                                                               | 2.50 |
| 5/ 2/80 | Research and draft instructions                                                                               | 3.00 |
| 5/ 6/80 | Review and research strict liability for<br>City: constitutional implications                                 | 2.50 |
| 5/ 7/80 | Review and research strict liability for<br>City: constitutional implications                                 | 3.00 |
| 5/ 8/80 | Review final argument structure: chart<br>on what facts look like                                             | 2.00 |
| 5/16/80 | Review witnesses statements                                                                                   | 1.50 |
| 5/19/80 | Review witnesses statements                                                                                   | 2.50 |
| 5/21/80 | Review discovery—individual activity                                                                          | 2.50 |
| 5/22/80 | Review discovery—inconsistencies                                                                              | 3.00 |
| 8/25/80 | Research and draft instructions                                                                               | 3.00 |
| 9/ 7/80 | Research most recent <i>Monell</i> case law                                                                   | 2.50 |
| 9/10/80 | Research most recent damages—rele-<br>vant evidence <i>Carey</i> issues                                       | 3.00 |
| 9/14/80 | Review police reports and discovery in<br>preparation for conference with Ca-<br>zares                        | 4.50 |
| 9/15/80 | Preparation for and conference with<br>Cazares                                                                | 6.50 |

|              |                                                                                                                    |                |
|--------------|--------------------------------------------------------------------------------------------------------------------|----------------|
| 9/16/80      | Preparation for and conference with Cazares                                                                        | 3.50           |
| 9/17/80      | Confer and prepare with Cazares re order of proof elements of cause of action; potential dismissals                | 4.50           |
| 9/18/80      | Confer and prepare: use of firearms, tear gas, etc.                                                                | 4.50           |
| 9/19/80      | Research for special instructions                                                                                  | 2.50           |
| 9/20/80      | Research for special instructions                                                                                  | 5.50           |
| 9/21/80      | Research for special instructions                                                                                  | 5.00           |
| 9/22/80      | Research for special instructions                                                                                  | 3.50           |
| 9/23/80      | Conference and prepare: police reports and depositions for cross-examination, review defendants' jury instructions | 4.50           |
| 9/23/80      | Confer and prepare particulars re special jury instructions                                                        | 5.00           |
| 9/24/80      | Draft idea for Cazares' final argument in view of testimony                                                        | 5.50           |
| 9/25/80      | Draft ideas for Cazares' final argument in view of testimony                                                       | 4.00           |
| 9/26/80      | Confer re final argument                                                                                           | 1.50           |
| 9/29/80      | Research on judgment NOV                                                                                           | 3.50           |
| 9/30/80      | Research on judgment NOV; draft arguments                                                                          | 4.00           |
| 11/ 6/80     | Research motion for attorneys fees                                                                                 | 3.00           |
| 11/ 7/80     | Research motion for attorneys fees                                                                                 | 4.00           |
| 11/12/80     | Draft points and authorities                                                                                       | 4.00           |
| 11/14/80     | Draft points and authorities                                                                                       | 1.50           |
| 11/15/80     | Review time sheets                                                                                                 | 4.50           |
| 11/28/80     | Work on attorney fee motion; review time sheet and draft affidavit                                                 | 8.00           |
| TOTAL HOURS: |                                                                                                                    | <hr/> 1,265.50 |

## California.

/s/ Gerald P. Lopez

STATE OF CALIFORNIA) ss.  
COUNTY OF SAN DIEGO)

SUBSCRIBED AND SWORN TO before me this 6th  
day of January, 1981, at San Diego, California.

/s/ Marianne V. Roiz  
Notary Public in and for  
said County and State

**Official Seal**  
**MARIANNE V. ROIZ**  
**Notary Public—California**  
**My Seal Expires July 15, 1982**

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KOTLER & KOTLER  
JONATHAN KOTLER  
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Suite 903  
Beverly Hills, CA 90211  
(213) 653-6273  
Attorneys for Defendants

(Caption omitted in printing)

No. CV 76-1803-MRP

DEFENDANTS' SUPPLEMENTAL MEMORAN-  
DUM OF POINTS AND AUTHORITIES IN RE-  
SPONSE TO MOTION BY PLAINTIFFS FOR  
ATTORNEYS FEES AND COSTS AND IN SUP-  
PORT OF MOTION BY DEFENDANTS FOR AT-  
TORNEYS FEES AND COSTS.

MEMORANDUM OF  
POINTS AND AUTHORITIES  
INTRODUCTION

On or about January 8, 1981, Fee-Petitioners in the above entitled matter submitted three additional documents in support of their motion for attorneys fees:

1. Affidavit of Robert L. Winslow in Support of Plaintiffs Motion for Reasonable Attorneys Fees and Costs;
2. Supplemental Affidavit of Gerald P. Lopez in support of Plaintiffs Motion for Reasonable Attorneys Fees and Costs; and

3. Opposition to Defendants Motion for Reasonable Attorneys Fees and Costs.

What follows is Defendants' brief response to the above documents.

POINTS AND AUTHORITIES

1.

THE AFFIDAVIT OF ROBERT L. WINSLOW IS OBJECTED TO ON THE GROUNDS THAT IT IS IRRELEVANT, AFFIANT LACKS PERSONAL KNOWLEDGE, AND IT IS REplete WITH HEARSAY.

Under Rule 401 of the Federal Rules of Evidence "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evidence which is not relevant is not admissible (F.R.E. 402). Although Mr. Winslow outlines a range of attorney rates, nowhere in Mr. Winslow's Affidavit does he state the amount that these particular attorneys charge. Courts have construed *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974) to require "what is needed is the customary fee charged by these particular lawyers." *Preston v. Mandeville*, 451 F. Supp. 617 (S.D. Ala. 1978). Mr. Winslow's Affidavit is therefore irrelevant on the issue of reasonable attorneys fees in this particular case.

Rule 602 of the Federal Rules of Evidence requires that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Paragraphs four and

five of Mr. Winslow's Affidavit (the only paragraphs of his affidavit which refer to Messrs. Lopez and Cazares with particularity), consist of Mr. Winslow's opinion based upon what he has been told. Nowhere in Mr. Winslow's affidavit does he assert that he has actually observed Messrs. Lopez or Cazares in the courtroom. Nowhere in his affidavit does he state that he has read any work product produced by Messrs. Lopez or Cazares. In short, Mr. Winslow, apparently, has had no opportunity to observe and perceive the facts which he sets forth by his own senses. Mr. Winslow simply lacks personal knowledge which is required for the proper admission of an affidavit as evidence in an action.

As this Honorable Court would be quick to recognize, the number of years that an attorney has practiced, and the law school from which he has graduated, taken alone, are not determinative of the proper reasonable hour billing rate for that person. In this case it is for this Honorable Court, not Robert L. Winslow, to determine the proper and reasonable billing rate for the attorneys involved. There is little doubt that this Honorable Court is qualified to determine intelligently and to the best possible degree this particular issue without enlightenment from Mr. Winslow.

Paragraphs four and five of Mr. Winslow's affidavit (the only paragraphs in his affidavit which refer directly to Mr. Cazares and Mr. Lopez) contain nothing but hearsay. These paragraphs set forth the education, the number of years in practice, the specialization, and the activities of Messrs. Cazare and Lopez, offered in evidence to prove the truth of the matter asserted, based upon facts of which Mr. Winslow has apparently been informed, but has no

personal knowledge. Neither of these paragraphs should be admitted by this Court.

## 2.

MR. LOPEZ' HOURS MUST BE REDUCED BECAUSE OF HIS FAILURE TO KEEP CONTEMPORANEOUS TIME RECORDS.

Mr. Lopez submitted a lengthy supplemental affidavit purportedly setting forth the number of hours expended on this case.

Mr. Lopez, however, has *failed to state* that the time list he submitted was kept contemporaneously. Based upon the character of many of the entries on Mr. Lopez' list, i.e. "Read second separate (45 page) motion to dismiss filed by various individual defendants." (page 9, lines 9-10); "Work on motion to require further answers and to compel production of documents: deliberately ignored discovery stated and asserted such objections as 'hearsay' and 'inadmissibility' of evidence; objected to terminology as 'unintelligible' when the term '*neighborhood problem*' was employed by defendants *not* plaintiffs; deliberately avoiding sub-parts to questions; asserting attorney-client privilege without even attempting to demonstrate that privilege exists and applies: refuse production of documents through blanket assertions of irrelevance of work product rule" (Page 12, lines 7-13); "Preparation for argument re Plaintiffs' motion re taxing of costs—granted; further work on discovery" (Page 17, lines 14-15).

Each of the above entries indicates that the entry was not made contemporaneously with the event. This is particularly true of the last example noted wherein Mr.

Lopez indicates that the Plaintiffs' motions re taxing of costs was granted as the date of 3/6/78 when he was making his preparation for argument. The other entries are simply editorial comments unlikely to have been made at the time the work was allegedly being done. Why would an attorney indicate how many pages a motion has on a time sheet, or how many interrogatories he received? Such comments are clearly designed for the benefit of this Honorable Court in the instant motion for attorneys fees. *Heigler v. Gatter*, 463 F.Supp. 802 (E.D. Pa. 1978) directs that any figure that Mr. Lopez has reconstructed is suspect and must be reduced approximately 20% because of his failure to keep contemporaneous time records.

### 3.

BECAUSE PLAINTIFFS' CLAIMS AGAINST DEFENDANTS WERE FRIVOLOUS, UNREASONABLE OR WITHOUT FOUNDATION, DEFENDANTS ARE ENTITLED TO AN AWARD OF ATTORNEYS FEES UNDER THE CIVIL RIGHTS ACT.

Plaintiffs' opposition to Defendants' motion for reasonable attorneys fees and costs re: the granting of 18 Summary Judgments, misses the focal point of Defendants' contention: Plaintiffs simply neglected to engage in *any* discovery or investigation which would have enabled them to determine the proper defendants in such a lawsuit. As the affidavits of Gerald P. Lopez and Roy B. Cazares clearly point out, Mr. Lopez and Mr. Cazares began working on this case on August 21, 1975. The Complaint was filed by them on June 6, 1976. Nearly a year passed from that time that the attorneys first met with their clients

and when the Complaint was eventually filed. At no time during that year—although Mr. Lopez has over 60 entries on his list of hours expended, and Mr. Cazares has over 20 entries on his list—was there any attempt to discover the names of the individual defendants who should be sued. Even though on January 14, 1976, Mr. Mr. (sic) Lopez made the following entry: “Research rationale and justification for John Doe practice in Ninth Circuit; alternatives in identifying unknown police officers,” there seems to have been no attempt made to identify the unknown police officers, nor was there any attempt made to determine whether those police officers sued were even at the scene or on duty at the time.

It is our contention that without *any* investigation on the part of Plaintiffs, Plaintiffs’ claims against these particular Defendants were frivolous, unreasonable or without foundation. The Summary Judgments granted herein—holding that there was no triable issue of fact involved as to these defendants—bears this out.

DATED: January 13, 1981.

Respectfully submitted,

JONATHAN KOTLER  
PATTI ANN KOTLER  
KOTLER & KOTLER  
/s/ PATTI ANN KOTLER  
Attorneys for Defendants

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(Caption omitted in printing)

CASE NO. CV. 76-1803 MRP

Filed: April 3, 1981

Clerk, U.S. District Court  
Central District of California

Entered: April 7, 1981

Clerk, U.S. District Court  
Central District of California

### JUDGMENT

The above entitled matter came on regularly for trial on September 16, 1980, the Honorable Mariana R. Pfaelzer, United States District Judge, presiding. The jury, having heard the evidence and argument of counsel, having been instructed and having had the case submitted to them, returned with verdicts.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the following verdicts are entered as part of the judgment:

1. In favor of the plaintiff SANTOS RIVERA and against the defendant LINFORD L. RICHARDSON, for negligence, actual or compensatory damages in the amount of \$50.00;
2. In favor of the plaintiff SANTOS RIVERA and against defendant MICHAEL S. WATTS, for negligence, actual or compensatory damages in the amount of \$50.00;
3. In favor of plaintiff SANTOS RIVERA and against defendant CITY OF RIVERSIDE, for negligence, actual or compensatory damages in the amount of \$2,400.00;



4. In favor of plaintiff SANTOS RIVERA and against defendant MICHAEL S. WATTS, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$1,000.00, and punitive damages in the amount of \$500.00;

5. In favor of the plaintiff MARK LARRABEE and against defendant CITY OF RIVERSIDE, for negligence, actual or compensatory damages in the amount of \$500.00;

6. In favor of the plaintiff MARK LARRABEE and against defendant MICHAEL S. WATTS, for a violation of 42 U.S.C. §§ 1983, actual or compensatory damages in the amount of \$50.00; and punitive damages in the amount of \$100.00;

7. In favor of the plaintiff MARK LARRABEE and against defendant LINFORD L. RICHARDSON, for negligence, actual or compensatory damages in the amount of \$25.00;

8. In favor of the plaintiff MARK LARRABEE and against the defendant MICHAEL S. WATTS, for negligence, actual or compensatory damages in the amount of \$25.00;

9. In favor of the plaintiff DONALD RIVERA and against the defendant MICHAEL S. WATTS, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$50.00, and punitive damages in the amount of \$100.00;

10. In favor of the plaintiff JENNIE RIVERA and against the defendant CITY OF RIVERSIDE, for negligence, actual or compensatory damages in the amount of \$2,900.00;

11. In favor of the plaintiff JENNIE RIVERA and against the defendant MICHAEL S. WATTS, for a violation of 42 U.S.C. § 1983, actual or compensatory dam-

ages in the amount of \$1,000.00, and punitive damages in the amount of \$500.00;

12. In favor of the plaintiff JENNIE RIVERA and against the defendant MICHAEL S. WATTS, for negligence, actual or compensatory damages in the amount of \$50.00;

13. In favor of the plaintiff JENNIE RIVERA and against the defendant LINFORD L. RICHARDSON, for negligence, actual or compensatory damages in the amount of \$50.00;

14. In favor of the plaintiff DONALD RIVERA and against the defendant LINFORD L. RICHARDSON, for negligence, actual or compensatory damages in the amount of \$25.00;

15. In favor of the plaintiff DONALD RIVERA and against the defendant MICHAEL S. WATTS, for negligence, actual or compensatory damages in the amount of \$25.00;

16. In favor of plaintiff DONALD RIVERA and against the defendant CITY OF RIVERSIDE, for negligence, actual or compensatory damages in the amount of \$500.00;

17. In favor of plaintiff LEE ROY RIVERA and against the defendant CITY OF RIVERSIDE, for false arrest/false imprisonment, actual or compensatory damages in the amount of \$3,000.00;

18. In favor of the plaintiff LEE ROY RIVERA and against the defendant DAN PETERS, for false arrest/false imprisonment, actual or compensatory damages in the amount of \$250.00;

19. In favor of the plaintiff LEE ROY RIVERA and against the defendant CITY OF RIVERSIDE, for violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$2,250.00;

20. In favor of the plaintiff JEROME RIVERA and against the defendant MICHAEL S. WATTS, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$50.00 and punitive damages in the amount of \$200.00;

21. In favor of the plaintiff JEROME RIVERA and against the defendant CITY OF RIVERSIDE, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$2,250.00.

22. In favor of the plaintiff JEROME RIVERA and against the defendant CITY OF RIVERSIDE, for false arrest/false imprisonment, actual or compensatory damages in the amount of \$3,000.00;

23. In favor of the plaintiff JEROME RIVERA and against the defendant ROBERT PLAIT, for false arrest/false imprisonment, actual or compensatory damages in the amount of \$750.00, and punitive damages in the amount of \$250.00;

24. In favor of the plaintiff JEROME RIVERA and against the defendant MICHAEL S. WATTS, for negligence, actual or compensatory damages in the amount of \$50.00;

25. In favor of the plaintiff JEROME RIVERA and against the defendant LINFORD L. RICHARDSON, for negligence, actual or compensatory damages in the amount of \$50.00;

26. In favor of the plaintiff JEROME RIVERA and against the defendant CITY OF RIVERSIDE, for negligence, actual or compensatory damages in the amount of \$500.00;

27. In favor of the plaintiff ENRIQUE FLORES and against defendant MICHAEL S. WATTS, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$50.00, and punitive damages in the amount of \$200.00;

28. In favor of the plaintiff ENRIQUE FLORES and against the defendant CITY OF RIVERSIDE, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$1,500.00;

29. In favor of the plaintiff ENRIQUE FLORES and against the defendant CITY OF RIVERSIDE, for negligence, actual or compensatory damages in the amount of \$500.00;

30. In favor of the plaintiff ENRIQUE FLORES and against the defendant MICHAEL S. WATTS, for negligence, actual or compensatory damages in the amount of \$50.00;

31. In favor of plaintiff ENRIQUE FLORES and against the defendant LINFORD L. RICHARDSON, for negligence, actual or compensatory damages in the amount of \$50.00;

32. In favor of the plaintiff MANUEL FLORES, JR., and against the defendant GERALD MILLER, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$500.00;

33. In favor of the plaintiff MANUEL FLORES, JR., and against the defendant ROBERT L. PLAIT, for a violation of 42 U.S.C. § 1983, actual or compensatory damages in the amount of \$1,000.00 and punitive damages in the amount of \$2,000.00;

34. In favor of the plaintiff MANUEL FLORES, JR., and against the defendant CITY OF RIVERSIDE, actual or compensatory damages in the amount of \$2,000.00;

35. In favor of the plaintiff MANUEL FLORES, JR., and against the defendant GERALD MILLER for negligence, actual or compensatory damages in the amount of \$500.00;

36. In favor of the plaintiff MANUEL FLORES, JR., and against the defendant ROBERT PLAIT, for negligence, actual or compensatory damages in the amount of \$1,000.00;

37. In favor of the plaintiff MANUEL FLORES, JR., and against the defendant CITY OF RIVERSIDE, for negligence, actual or compensatory damages in the amount of \$1,500.00.

FURTHER, on January 19, 1981, plaintiffs' and defendants' motions for reasonable attorneys' fees and costs came on regularly for hearing before the Honorable Mariana R. Pfaelzer, United States District Judge. Plaintiffs appeared by and through their counsel of record Gerald P. Lopez and Roy B. Cazares. Defendants appeared by and through their counsel of record, Jonathan Kotler and Patricia Kotler. The Court, having examined and considered the papers filed by the parties, having heard the argument of counsel, and having caused to be made and filed herein its written Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for reasonable attorneys' fees and costs is hereby granted pursuant to 42 U.S.C. § 1988. Defendants are ordered to pay plaintiffs' reasonable attorneys' fees in the amount of \$245,456.25.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants' motion for attorneys' fees and costs is denied.

DATED: March 31, 1981

/s/ Mariana R. Pfaelzer  
United States District Judge

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(Caption omitted in printing)  
CASE NO. CV 76-1803 MRP

Filed: April 3, 1981  
Clerk, U.S. District Court  
Central District of California

Entered: April 7, 1981  
Clerk, U.S. District Court  
Central District of California

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs' motion for the award of reasonable attorneys' fees and costs came on for hearing on January 19, 1981 before the Honorable Mariana R. Pfaelzer, United States District Judge. The Court, having heard and considered oral argument and having examined and considered the memoranda, affidavits and exhibits filed by the parties, makes the following Findings of Fact and Conclusions of Law:

#### FINDINGS OF FACT

1. Plaintiffs' action presented complex issues of law in a case involving eight individual plaintiffs, eleven individual defendants and a municipal defendant.

2. Counsel demonstrated skill and experience in handling this protracted civil rights case.

3. Given the nature of this lawsuit, many attorneys within the community would have been reluctant to institute this action.

4. The Court finds the following claimed number of hours to be fair and reasonable:



*Attorney Services*

|                 |                              |
|-----------------|------------------------------|
| Roy B. Cazares  | 681.25 hours                 |
| Gerald P. Lopez | 1,265.50 hours               |
| <b>TOTAL</b>    | <b><u>1,946.75 hours</u></b> |

*Law Clerk Services*

84.50 hours

5. The amount of time expended by counsel in conducting this litigation is reasonable and reflects sound legal judgment under the circumstances of this case.

6. Counsel for plaintiffs base their claimed award of attorneys' fees on an hourly rate of \$125 per hour. This rate of compensation is typical of the hourly rate earned by attorneys of like experience within this judicial district.

7. The rate of \$25 per hour, which counsel seek as compensation for the time expended by two law clerks, is a reasonable and customary hourly fee.

8. Plaintiffs have incurred reasonable attorneys' fees in the amount of \$243,343.75 plus \$2,112.50 in fees expended for law clerks. The amount of the total award is \$245,456.25.

9. To the extent that any of the Conclusions of Law set forth below are deemed to be Findings of Fact, they are incorporated herein.

**CONCLUSIONS OF LAW**

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. To the extent that any of the foregoing Findings of Fact are deemed to be Conclusions of Law, they are incorporated herein.

2. Plaintiffs maintained this civil action in order to secure the vindication of important constitutional rights. A fee award in the instant civil rights action will therefore advance the public interest.

3. No special circumstances exist which would render an award of attorneys' fees unjust.

4. Reasonable charges for services of law clerks may be properly included as part of an attorneys' fee award. *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); *Keith v. Volpe*, 86 F.R.D. 565, 576 (C.D. Cal. 1980).

5. Plaintiffs seek reimbursement for certain expenditures made by them during the prosecution of this case. As 42 U.S.C. § 1988 does not provide for the reimbursement of such expenses, the Court declines to order their reimbursement.

6. Plaintiffs, as the prevailing party, are entitled to an award of attorneys' fees in the amount of \$245,456.25 as part of the costs pursuant to the Civil Rights Attorney's Fee of 1976, 42 U.S.C. § 1988.

7. This award is rendered against defendants in their official capacities.

DATED: March 31, 1981

/s/ Mariana R. Pfaelzer  
United States District Judge

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SANTOS RIVERA, JENNIE RIVERA, DONALD  
RIVERA, JEROME RIVERA, LEE ROY RIVERA,  
MARK LARABEE, ENRIQUE FLORES, MANUEL  
FLORES, JR.

Plaintiffs/Appellees,

vs.

CITY OF RIVERSIDE, LINFORD L. RICHARDSON,  
MICHAEL S. WATTS, DAN PETERS, GERALD  
MILLER, ROBERT PLAIT,

Defendants/Appellants.

No. 81-5362  
D.C. No. CV76-1803-MRP

Filed: June 15, 1982

PHILLIP B. WINBERRY  
Clerk, U. S. Court of Appeals

OPINION

Appeal from the United States District Court for the  
Central District of California The Honorable Marian-  
na R. Pfaelzer, Presiding

Argued and Submitted—March 2, 1982

Before: HUG, TANG, and PREGERSON, Circuit Judges.  
PREGERSON, Circuit Judge:

42 U.S.C. § 1988 provides: "In any action or proceed-  
ing to enforce a provision of sections 1981, 1982, 1983, 1985,  
and 1986 of this title . . . the court, in its discretion, may  
allow the prevailing party, other than the United States,  
a reasonable attorney's fee as part of the costs."

This appeal presents the question whether the amount of attorney's fees the district court awarded was reasonable under section 1988 where that amount greatly exceeded the verdict, and where the prevailing party was successful on fewer than all claims against fewer than all defendants.

Plaintiffs/appellees are Mexican-Americans who sought to vindicate their civil rights in a politically unpopular suit against the City of Riverside, the Riverside police chief, and thirty Riverside police officers.

The events out of which this lawsuit arose took place in August 1975, when appellees attended a party at a private residence in Riverside, California. The police, without a warrant, but with tear-gas and unnecessary physical force, broke up the party and arrested four of the appellees. The charges were dismissed for lack of probable cause.

Appellees sued the thirty-two defendants, alleging civil rights and pendent state tort violations.<sup>1</sup> The court granted summary judgment in favor of eighteen individual defendants and dismissed the claims against them.<sup>2</sup> After four years of discovery and two settlement conferences, a nine day trial ensued. The jury found in favor of all eight plaintiffs and against the City of Riverside and four of the individual officers on the negligence, false arrest, false imprisonment, and section 1983 claims. The jury awarded appellees total damages of \$33,350.

After the trial, appellees moved for reasonable attorney's fees and costs pursuant to section 1988. The district court granted the motion and awarded \$243,343.75 in attorney's fees (computed at \$125 per hour, the standard rate

for attorneys with comparable expertise in the civil rights area) and \$2,112.50 in law clerk's fees (computed at \$25 per hour).<sup>3</sup>

Appellants do not appeal the adverse jury verdict or the court's determination that appellees are entitled to an attorney's fees award. Appellants do, however, contend that the fee award is excessive.

### DISCUSSION

In 1976, Congress enacted 42 U.S.C. § 1988 and thereby firmly established that successful civil rights plaintiffs may receive reasonable attorney's fees as part of the costs. The amount of reasonable attorney's fees is within the sound discretion of the trial court. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69 (9th Cir. 1975), *cert. denied sub nom. Perkins v. Screen Extras Guild, Inc.*, 425 U.S. 951 (1976). The trial court's determination of a reasonable attorney's fee will not be disturbed absent clear abuse of discretion. *Id.* See also *Twentieth Century Fox Corp. v. Goldwyn*, 328 F.2d 190, 221 (9th Cir.) *cert. denied*, 379 U.S. 880 (1964).

In *Kerr*, this court listed twelve factors for the district court to consider in setting attorney's fees awards.<sup>4</sup> The record must "demonstrate that the district court considered the factors established by *Kerr*." *Kessler v. Associates Financial Services Company of Hawaii, Inc.*, 639 F.2d 498, 500 (9th Cir. 1981). The district court, however, need not discuss specifically each of the twelve factors. It is sufficient if the record shows that the court considered the factors "called into question by the case at hand and necessary to support the reasonableness of the fee award." *Id.* at 500 n.1. (citing *Stanford Daily v. Zurcher*, 64 F.R.D.

680, 682 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir.), *rev'd on other grounds*, 436 U.S. 547 (1978)). See also *Manhart v. City of Los Angeles*, 652 F.2d 904, 907 (9th Cir. 1981).

The record here indicates that the court considered, applied, and discussed the *Kerr* factors necessary to support the award.<sup>5</sup> Having reviewed the record, we are satisfied that the district court did not abuse its discretion in awarding the attorney's fees requested.

Appellants urge this court to reduce the amount awarded because appellees "succeeded" on fewer than all of the original claims against fewer than all of the original thirty-two defendants, *Sethy v. Alameda County Water District*, 602 F.2d 894 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980), and because the attorney's fees were disproportionately larger than the jury verdict. *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972).

In *Manhart*, we construed *Sethy* and concluded that no attorney's fees "may be paid for the time spent to prepare *unrelated claims* on which plaintiffs did not prevail." 652 F.2d at 909, citing *Sethy*, 602 F.2d at 898 (emphasis added). We distinguished *Sethy* by pointing out that "plaintiffs [in *Manhart*] pursued *several claims* to remedy the *same injury*, gender discrimination." 652 F.2d at 909. In *Manhart*, we concluded that if all claims are related to the same injury, then the amount of attorney's fees should not be reduced for time spent on unsuccessful claims if plaintiff prevails in the ultimate goal of the lawsuit.

Like *Manhart*, the present case involves related claims brought to remedy the same injury—here, the violation of



civil rights. The district court, therefore, properly awarded attorney's fees for hours expended on unsuccessful but related claims. *See also Seattle School District No. 1 v. Washington*, 633 F.2d 1338, 1349-50 (9th Cir. 1980); *Northcross v. Board of Education of the Memphis City Schools*, 611 F.2d 624, 636 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). This result is in line with Congress' unequivocal viewpoint that civil rights attorneys should be compensated "as is traditional with attorneys compensated by a fee-paying client for all time reasonable expended on a matter." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976). Traditional methods of attorney compensation based on fee-paying clients do not differentiate between successful and unsuccessful claims. *See, Northcross*, 611 F.2d 636.

In passing section 1988, Congress intended to provide access to the judicial system for those who wish to vindicate civil rights violations. Reducing attorney's fees awards for unsuccessful related claims brought in good faith would militate against that policy and "would hardly further our mandate to use the 'broadest and most flexible remedies available' to us to enforce the civil rights laws if we were so directly to discourage innovative and vigorous lawyering in a changing area of the law."<sup>6</sup> *Northcross*, 611 F.2d at 636.

This decision is not affected by *Bartholomew v. Watson*, No. 80-3237, (9th Cir. Jan. 11, 1982), which does not refer to our earlier *Manhart* decision. *Bartholomew* was remanded because the record failed to reflect the standard the district court employed in granting the entire amount of attorney's fees requested by the prevailing party. In the present case, the record reflects that the district court applied the correct standard.



Appellants rely on *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972), to support their contention that the amount of attorney's fees awarded must be proportionate to the jury verdict. In *Schaeffer*, a Title VII case, the district court declared invalid certain state laws relating to employee working conditions, refused damages for back pay, and awarded the prevailing party \$600 in attorney's fees. The Ninth Circuit reversed in part, holding that certain issues were moot and that the plaintiff should receive some of the back pay that was denied. We remanded and suggested that the amount of attorney's fees "should be proportionate to the extent to which the plaintiff prevail[ed] in the suit." *Id.* at 1008 (emphasis added).

*Schaeffer* does not, as appellants suggest, prohibit an attorney's fees award disproportionate to a jury verdict. The extent to which a plaintiff has "prevailed" is not necessarily reflected in the amount of the jury verdict. Rather, the legislative history behind section 1988 demonstrates Congress' position that courts should award reasonable attorney's fees even if the rights vindicated are "nonpecuniary in nature. . . ." S. Rep. 94-1011, 94th Cong. 2d Sess. 6 (1976). *Schaeffer* does not limit the amount of attorney's fees a prevailing party may recover. That decision rests within the discretion of the district court.

We conclude that the district court did not abuse its discretion in awarding the attorney's fees requested by the plaintiffs/appellees.

**AFFIRMED.**

## FOOTNOTES

1. The complaint alleged violations of plaintiffs' civil rights protected by the First, Fourth, and Fourteenth Amendments, and 42 U.S.C. §§ 1981, 1983, 1985(3), and 1986. In connection with said civil rights violations, plaintiffs also alleged related state law claims predicated on conspiracy, infliction of emotional distress, assault and battery, property damage, breaking and entering, malicious prosecution, defamation, false arrest, false imprisonment, lost wages, negligence, and sought damages and declaratory and injunctive relief.
2. The reason why plaintiffs initially sued thirty Riverside police officers was because plaintiffs had great difficulty learning the identity of the officers actually involved in the incident that gave rise to the action.
3. The court reduced the original request by the amount of costs not contemplated under section 1988 (out-of-pocket office expenses) and did not apply the multiplier requested by appellees.
4. The following twelve factors were established first in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974) and adopted by the Ninth Circuit in *Kerr*:
  1. The time and labor required;
  2. The novelty and difficulty of the questions;
  3. The skill requisite to perform the legal services properly;
  4. The preclusion of other employment due to acceptance of the case;
  5. The customary fee;
  6. The contingent or fixed nature of the fee;
  7. The limitations imposed by the client or the case;
  8. The amount involved and the results obtained;
  9. The experience, reputation, and ability of the attorneys;
  10. The undesirability of the case;
  11. The nature of the professional relationship with the client;
  12. Awards in similar cases.

5. The district court carefully determined that:
    1. The action presented complex issues;
    2. The amount of time expended was reasonable and reflected sound legal judgment under the circumstances;
    3. The attorneys demonstrated skill and experience in handling this protracted civil rights case;
    4. The action was maintained to vindicate important constitutional rights and therefore advanced the public interest.
  6. This is especially true in the present case. Appellees brought suit in 1975, years before the Supreme Court declared that municipalities could be sued under section 1983. *Monell v. Department of Social Services*, 436 U.S. 658 (1978).
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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1982

CITY OF RIVERSIDE, LINFORD L. RICHARDSON,  
MICHAEL S. WATTS, DAN PETERS, GERALD MIL-  
LER, and ROBERT PLAIT,

Petitioners,

vs.

SANTOS RIVERA, JENNIE RIVERA, DONALD RI-  
VERA, JEROME RIVERA, LEE ROY RIVERA, MARK  
LARABEE, ENRIQUE FLORES, and MANUEL  
FLORES, JR.,

Respondents.

No. 82-156

D.C. NO. CV76-1803-MRP

Filed: May 31, 1983

ORDER GRANTING PETITION FOR CERTIORARI  
AND ORDER OF REMAND

Certiorari granted, judgment vacated, and case re-  
manded for further consideration in light of *Hensley v.*  
*Eckhardt*, ante, p. 424. Reported below: 679 F.2d 795.

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SANTOS RIVERA, et al.,

Plaintiffs,

v.

CITY OF RIVERSIDE, et al.,

Defendants.

No. CV 76 1803-MRP

Filed: July 26, 1984

Clerk, U.S. District Court  
Central District of California

ORDER

Plaintiffs' motion for an award of attorney's fees and costs came on for hearing on October 24, 1983 and June 6, 1984 before the Honorable Mariana R. Pfaelzer, United States District Judge, on remand from the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Hensley v. Eckerhart*, — U.S. —, 103 S.Ct. 1933 (1983). Plaintiffs appeared at both hearings by and through their counsel, Patrick O. Patterson. Defendants appeared at both hearings by and through their counsel, Jonathan Kotler. The Court, having considered plaintiffs' memorandum regarding the hearing on filing and spreading the judgment of the Court of Appeals, having heard oral argument, having reconsidered the memoranda, affidavits, and exhibits previously filed by the parties, as well as the record as a whole, and having made and filed its written Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for reasonable attorney's fees and costs is hereby granted pursuant to 42 U.S.C. § 1988. Defendants are ordered to pay plaintiffs' reasonable attorney's fees in the amount of \$245,456.25.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants' motion for attorney's fees and costs is denied.

DATED: July 24, 1984

/s/ MARIANA R. PFAELZER

United States District Judge

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(Caption omitted in printing)

No. CV 76 1803-MRP

Filed: July 26, 1984

Clerk, U.S. District Court  
Central District of California

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs motion for an award of attorney's fees and costs came on for hearing on October 24, 1983 and June 6, 1984 before the Honorable Mariana R. Pfaelzer, United States District Judge, on remand from the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Hensley v. Eckerhart*, — U.S. —, 103 S.Ct. 1933 (1983). The Court, having examined and considered plaintiffs' memorandum regarding the hearing on filing and spreading the judgment of the Court of Appeals, having heard and considered oral argument, and having reconsidered the memoranda, affidavits, and exhibits previously filed by the parties, as well as the record as a whole, makes the following Findings of Fact and Conclusions of Law.

### FINDINGS OF FACT

1. Plaintiffs' action presented complex and inter-related issues of fact and law in a civil rights case involving eight individual Chicano plaintiffs, a number of individual police officer defendants, and one municipal defendant, the City of Riverside.

2. The events upon which this action is predicated took place in the evening on August 1, 1975 when plaintiffs attended a party at a private residence located in River-



side. A large number of unidentified Riverside police officers, acting without a warrant but with tear gas and unnecessary physical force, broke up the party and arrested many of the people attending, including four of the plaintiffs. The party was not creating a disturbance in the community at the time of the break-in. The plaintiffs who were arrested were prosecuted, but the charges were dismissed for lack of probable cause.

3. A number of police officers were involved in the events referred to in Finding number 2 and at the trial the testimony of the parties and the witnesses was often in conflict as to the role of the individual officers in the events of the evening.

4. Under the circumstances of this case, it was reasonable for plaintiffs initially to name thirty-one individual defendants (thirty police officers and the chief of police) as well as the City of Riverside as defendants in this action. After further investigation and discovery, the Court granted summary judgment in favor of eighteen of the individual defendants and dismissed the claims against them.

5. After four years of discovery and two settlement conferences, both of which were ordered by and took place in the presence of this Court, a nine-day jury trial ensued. The jury, following seven days of deliberation, found in favor of all eight plaintiffs and against the City of Riverside and four of the individual officers on the § 1983, false arrest, false imprisonment and negligence claims. The jury awarded total damages of \$33,350. In the opinion of the Court, the size of the jury award resulted from (a) the general reluctance of jurors to make large awards

against police officers, and (b) the dignified restraint which the plaintiffs exercised in describing their injuries to the jury. For example, although some of the actions of the police would clearly have been insulting and humiliating to even the most insensitive person and were, in the opinion of the Court, intentionally so, plaintiffs did not attempt to play up this aspect of the case.

6. Plaintiffs were the prevailing parties in this action. The central and most important issue in this case was whether there was police misconduct committed by and condoned by defendants. Plaintiffs established this misconduct to the satisfaction of the jury and the Court. With respect to this central issue, plaintiffs were clearly the prevailing parties.

7. All claims made by plaintiffs were based on a common core of facts. The claims on which plaintiffs did not prevail were closely related to the claims on which they did prevail. The time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail.

8. Counsel demonstrated outstanding skill and experience in handling this case.

9. Given the nature of this lawsuit and the type of defense presented, many attorneys in the community would have been reluctant to institute and to continue to prosecute this action.

10. The Court finds the following claimed number of hours to be fair and reasonable:

*Attorney Services:*

|                 |                |
|-----------------|----------------|
| Roy B. Cazares  | 681.25 hours   |
| Gerald P. Lopez | 1,265.50 hours |
| TOTAL           | 1,946.75 hours |

*Law Clerk Services:*

84.50 hours

11. Counsel for plaintiffs achieved excellent results for their clients, and their accomplishment in this case was outstanding. The amount of time expended by counsel in conducting this litigation was reasonable and reflected sound legal judgment under the circumstances.

12. Counsel for plaintiffs also served the public interest by vindicating important constitutional rights. Defendants had engaged in lawless, unconstitutional conduct, and the litigation of plaintiffs' case was necessary to remedy defendants' misconduct. Indeed, the Court was shocked at some of the acts of the police officers in this case and was convinced from the testimony that these acts were motivated by a general hostility to the Chicano community in the area where the incident occurred. The amount of time expended by plaintiffs' counsel in conducting this litigation was clearly reasonable and necessary to serve the public interest as well as the interests of plaintiffs in the vindication of their constitutional rights.

13. Counsel for plaintiffs base their claimed award of attorney's fees on a rate of \$125.00 per hour. The Court finds this hourly rate typical of the prevailing market rate for similar services by lawyers of comparable skill, experience and reputation within the Central District at the time these services were performed.

14. The rate of \$25.00 per hour, which counsel seeks as compensation for the time expended by two law clerks, was lower than the customary hourly rate for such services at the time those services were performed.

15. Plaintiffs achieved a level of success in this case that makes the total number of hours expended by counsel a proper basis for making the fee award.

16. Plaintiffs are entitled to attorney's fees in the amount of \$243,343.75 plus \$2,112.50 in fees expended for law clerks. The amount of the total award is \$245,456.25, exclusive of interest.

17. To the extent that any of the Conclusions of Law are deemed to be Findings of Fact, they are incorporated herein.

### CONCLUSIONS OF LAW

1. To the extent that any Findings of Fact are deemed to be Conclusions of Law, they are incorporated herein.

2. Plaintiffs are the prevailing parties in this action.

3. Plaintiffs maintained this action in order to secure the vindication of important constitutional rights. A fee award in this civil rights action will therefore advance the public interest.

4. No special circumstances exist which would render an award of attorney's fees unjust.

5. Reasonable charges for services of law clerks may be properly included as part of an award of attorney's fees. *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 n.19 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); *Keith v. Volpe*, 86 F.R.D. 565, 576 (C.D. Cal. 1980).

6. Plaintiffs seek reimbursement for certain expenditures made by them during the prosecution of this case. As 42 U.S.C. § 1988 does not provide for the reimbursement of such expenses, the Court declines to order their reimbursement.

7. Plaintiffs achieved a level of success in this case that makes the total number of hours expended by counsel a proper basis for the fee award. The amount of the fee awarded is justified in light of the substantial success achieved by plaintiffs. *Hensley v. Eckerhart*, — U.S. —, 103 S.Ct. 1933, 1940-43 (1983); *Rutherford v. Pitchess*, 713 F.2d 1416, 1421-22 (9th Cir. 1983); *White v. City of Richmond*, 713 F.2d 458, 461-62 (9th Cir. 1983); *Smiddy v. Varney*, 574 F. Supp. 710, 713 (C.D. Cal. 1983).

8. Plaintiffs' counsel are entitled to be compensated at the prevailing market rates within the Central District for similar services by lawyers of comparable skill, experience and reputation at the time. *Blum v. Stenson*, — U.S. —, 104 S.Ct. 1541, 1547 & n.11 (1984); *White v. City of Richmond*, 713 F.2d at 460-61.

9. Plaintiffs are entitled to an award of attorney's fees in the amount of \$245,456.25 pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

DATED: July 24, 1984

/s/ MARIANA R. PFAELZER  
United States District Judge

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SANTOS RIVERA, JENNIE RIVERA,  
DONALD RIVERA, JEROME RIVERA,  
LEE ROY RIVERA, MARK LARABEE,  
ENRIQUE FLORES, MANUEL FLORES, JR.,  
Plaintiffs-Appellees,

vs.

CITY OF RIVERSIDE, LINFORD L.  
RICHARDSON, MICHAEL S. WATTS,  
DAN PETERS, GERALD MILLER,  
ROBERT PLAIT,

Defendants-Appellants.

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No. 84-6265

D.C. No. CV 76-1803-MRP

Filed: June 27, 1985  
PHILLIP B. WINBERRY  
Clerk, U. S. Court of Appeals

OPINION

An appeal from the United States District Court For  
The Central District of California The Hon. Mariana  
R. Pfaelzer, Judge Presiding

Submitted: March 8, 1985\*

\*The panel unanimously finds this case suitable  
for decision without oral argument. Fed. R. App.  
P. 34(a) and Ninth Circuit Rule 3(f).

Before: HUG, TANG, and PREGERSON.  
Circuit Judges.

PREGERSON, Circuit Judge.

The City of Riverside appeals the district court's  
award of \$243,343.75 in attorney's fees to plaintiffs under



42 U.S.C. § 1988 (1982). The court awarded fees to plaintiffs because they prevailed on their civil rights claims against defendants.

In the underlying suit, filed in 1976, plaintiffs alleged that Riverside city police officers had violated plaintiffs' Fourth Amendment rights. Following trial in 1980, the jury found for the plaintiffs, and the district court awarded them attorney's fees. We affirmed the district court in an opinion published at 679 F.2d 795 (9th Cir. 1982), but the Supreme Court vacated and remanded the matter for reconsideration in light of *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *City of Riverside v. Rivera*, 461 U.S. 952 (1983). On remand, the district court made comprehensive findings of fact and conclusions of law demonstrating that it had considered the applicable factors necessary to support the reasonableness of the fee award. These factors are enumerated in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).<sup>1</sup> In July 1984, the district court awarded the plaintiffs' attorney's fees in the same amount as previously awarded.

We find that the district court correctly reconsidered the case in light of *Hensley* and that the fee award is reasonable. Because the district court did not abuse its discretion in reaching its decision, we affirm.

Reasonable attorney's fees in civil rights cases may be awarded to the prevailing party at the district court's discretion, 42 U.S.C. § 1988 (1982), and we will not disturb the award absent an abuse of discretion. *Rutherford v. Pitchess*, 713 F.2d 1416, 1420 (9th Cir. 1983) (citing *Kerr*, 526 F.2d at 69). The plaintiffs are clearly the pre-



vailing parties here. They succeeded on the most significant issue of the litigation—they proved that their civil rights had been violated by law enforcement officers.

In *Hensley*, the Supreme Court held that “the extent of a plaintiff’s success is a crucial factor in determining the proper amount of an award of attorney’s fees under 42 U.S.C. § 1988.” 461 U.S. at 440. The amount awarded must be reasonably related to the results obtained. *Id.* To demonstrate adequately the relationship between outcome and award, the district court need not specifically discuss each of the twelve “Kerr factors.” The court need only explain how the award is reasonably related to the outcome of the proceedings.<sup>2</sup> *Id.* at 437; *Rutherford*, 713 F.2d at 1420. The district court in the instant case considered the outcome of the proceedings and sufficiently explained how it took the outcome into account in fixing fees. *See Hensley*, 461 U.S. at 437.

Appellants argue that plaintiffs’ counsel spent time on claims unrelated to the successful claims, and that unproductive hours should be excluded from the computation of attorney fees. *See id.* at 434. In the instant case, however, the district court concluded that plaintiffs’ attorneys spent no time on claims unrelated to the successful claims. The record supports the district court’s findings that all of the plaintiffs’ claims involve a “common core of facts” and that the claims involve related legal theories. *Hensley* teaches that “[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney’s fee reduced simply because the district court did not adopt each contention raised.” *Id.* at 440.

Moreover, “the district court should focus on the significance of the overall relief obtained . . . in relation

to the hours reasonably expended on the litigation.” *Id.* at 435. On remand, this relationship is precisely what the district court focused on. The court considered the degree of success in relation to the ultimate award of fees and found a reasonable relationship between the extent of that success and the amount of the award. Because the district court clearly and concisely explained the grounds for its decision, we conclude that it did not abuse its discretion in awarding fees.<sup>3</sup>

Appellants also contend that the amount of the attorney’s fee award is excessive because the amount of damages awarded by the jury, viz., \$33,350, is relatively small in comparison to the attorney’s fee award. The legislative history of section 1988 demonstrates that its purpose is to ensure “effective access to the judicial process.” *Id.* at 429 (quoting H. R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976)). The amount of fees awarded should “not be reduced because the rights involved may be non-pecuniary in nature.” *Id.* at 430 n.4 (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5913). The legislative history therefore lends no support to the proposition that there need be a relationship between the amount of damages awarded to the prevailing party and the amount of attorney’s fees awarded.

Appellants finally contend that the district court did not review the record to see if the award was justified. This contention is meritless. The district court stated at oral argument in October 1983 that should the appellants be correct in their assertion that the award was not supported by the record, the court would “probably need another hearing.” The statement indicated that the court

intended to review the record to be sure that its decision was properly supported. The court's extensive findings of fact and conclusions of law indicate that it thoroughly reviewed the record.

In short, the district court correctly applied the necessary criteria to justify the attorney's fees awarded and explained the reasons for the award clearly and concisely. As required by *Hensley*, the district court adequately discussed the extent of the plaintiffs' success and its relationship to the amount of the attorney's fees awarded. 461 U.S. at 437. The award is well within the discretion of the district court.

**AFFIRMED.**

## FOOTNOTES

1. The twelve *Kerr* factors are:

- (1) The time and labor required;
- (2) The novelty and difficulty of the questions;
- (3) The skill requisite to perform the legal service properly;
- (4) The preclusion of employment by the attorney due to acceptance of the case;
- (5) The customary fee;
- (6) Whether the fee is fixed or contingent;
- (7) Time limitations imposed by the client or the circumstances;
- (8) The amount involved and the results obtained;
- (9) The experience, reputation, and ability of the attorneys;
- (10) The undesirability of the case;
- (11) The nature and length of the professional relationship with the client;
- (12) Awards in similar cases.

*Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976). These guidelines were initially presented in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and derive directly from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106.

2. The district court did, in fact, consider most of the *Kerr* factors specifically in its findings of facts and conclusions of law (i.e., factors 1, 2, 3, 5, 8, 9, 10, and 11). The appellants concede that, under the law of the Ninth Circuit, the district court is not required to respond to each of the factors enumerated.
  3. The district court on remand reduced the original request by the amount of costs not contemplated under section 1988 and did not apply the multiplier requested by the appellees. The court stated that perhaps a multiplier should have been applied in light of the exceptional job the prevailing attorneys did, but again failed to do so after considering the case as a whole. Use of a multiplier may be appropriate where "the results obtained . . . represent a significant achievement." *White v. City of Richmond*, 713 F.2d 458, 461 (9th Cir. 1983). The court's decision not to apply the multiplier is another indication that the district court carefully balanced the appropriate factors in awarding attorneys fees.
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RELEVANT EXCERPTS FROM REPORTER'S  
TRANSCRIPTS OF PROCEEDINGS

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
HONORABLE MARIANA R. PFAELZER,  
JUDGE PRESIDING

No. CV 76-1803-MRP

SANTOS RIVERA, et al.,

Plaintiffs,

vs.

CITY OF RIVERSIDE, et al.,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
(Partial)

PLACE: Los Angeles, California

DATE: Tuesday, October 7, 1980

REBECCA RIMSON

Official Reporter

325 U. S. Court House

312 North Spring Street

Los Angeles, California 90012

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APPEARANCES:

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For the Defendants:

KOTLER & KOTLER; By  
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\* \* \*

(p. 3) LOS ANGELES, CALIFORNIA, TUESDAY, OCTOBER 7, 1980; 2:30 P.M.

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THE COURT: All right. Mr. Flores is going to make a copy of the verdicts for you, both of you, and I will hear anything that you have to say and I will listen to anything you want to say about any further application for relief that you want to make to the Court or any motions that you want to make of any kind.

MR. CAZARES: At this time, Your Honor? Well—

THE COURT: You don't have to make the motion now. I am asking you is there anything further that either of you want the Court to do?

MR. CAZARES: Yes, Your Honor.

THE COURT: Or any motion you want to make?

MR. CAZARES: On behalf of the plaintiffs and their counsel, we will be making a motion for attorney fees and perhaps a motion for additur.

MR. KOTLER: Your Honor, the only thing I'd like to request to the Court at this time is that if the Court is aware of our scheduling difficulties, to the extent that we have motions, and they are set far enough into November that we could prepare an adequate response to.

THE COURT: Well, you can agree with Mr. Cazares about how we are going to deal with the attorney's fees issue. (p. 4) The only thing I can tell you is I'm not going to set it in November. It has to be set in October.

MR. KOTLER: We're not going to be in the country.

THE COURT: You're about to leave, aren't you?

MR. KOTLER: Yes, Your Honor.

THE COURT: Then we can set it as soon as—when are you coming back?

MR. KOTLER: We'll be back around the 1st of November.

THE COURT: Then we can set it a week after you get back.

MR. KOTLER: I had in mind—it would be on a Monday, would it?

THE COURT: No, it doesn't have to be. It can be any day you wish.

MR. KOTLER: I was going to suggest November 10, which is the first Monday.

THE COURT: Is that all right with you?

MR. CAZARES: Yes.

THE COURT: Now, the burden is on you, as you know. All you have to do is to submit to the Court what your hours are.

MR. CAZARES: Yes.

THE COURT: And what you did.

MR. CAZARES: Yes.



(p. 5) THE COURT: The only thing I advise you is that you know, as well as I do, in the Ninth Circuit you have to give me the hours, the day you worked, and what you did.

MR. CAZARES: Yes, ma'am.

THE COURT: And if there are other people who worked—for example, Mr. Lopez, Professor Lopez, or any other people who have worked on the case. But you've got to tell them that I cannot grant attorney's fees of any kind or costs unless I have somebody give me a detailed account of what was done.

MR. CAZARES: Yes.

THE COURT: Now, it's obvious that I do not have to have a very detailed account of the days you were in trial, because you were in trial all that length of time, and I can take notice of that. But the preparation for the trial and all the time that you spent in coming here with the Riveras, and so forth, I have to have dates and hours.

MR. CAZARES: We'll prepare a proper motion, Your Honor.

THE COURT: Did you come to—and you also have to be aware of another thing, and that is, since I wasn't the judge on the case originally, you will have to reach back to the period of time when it was in the hands of another judge.

MR. CAZARES: Yes.

(p. 6) THE COURT: Now, the only thing I tell you, Mr. Kotler, is that he is going to get substantial at-

torney's fees, because this is a lot of time we're talking about.

MR. KOTLER: Yes, Your Honor.

THE COURT: My disposition now, so that you would be aware of it, is that I would give Mr. Cazares the attorney's fees that cover everything that he did that's legitimate so that the burden of the attorney's fees does not fall on the parties.

MR. KOTLER: Is Your Honor aware that there are other judgments that were issued summarily by Judge Ferguson and still not final as of this time?

THE COURT: I understand that, but I will have to reach back in those files. You will have to give me a legal ground to do it, and then you'll have to give me the time, but if you give me the basis for the time—I'm doing this more for your benefit, Mr. Kotler, than I am anybody else's, because I want to let you know now how I feel about attorney's fees. It is wrong to ask counsel who worked that hard and then not compensate him if there's a legal ground to do it and he can show me. That's all.

MR. KOTLER: I'm not disagreeing.

THE COURT: And the final thing I say is that I have no quarrel with the quality of what he did. So if I have no quarrel with the quality and he gives me the hours, (p. 7) I will compensate him. And you'll have to tell me the rate.

MR. CAZARES: Yes, Your Honor.

THE COURT: All right.

MR. CAZARES: Thank you.

THE COURT: Now, is there anything else?

MR. KOTLER: Have we agreed on the 10th of November?

THE COURT: Well, you take the time.

MR. CAZARES: Yes. That's fine.

THE CLERK: 9:30.

THE COURT: All right. Now, when will you put the papers in and when will you answer? That you will have to agree to.

MR. KOTLER: I can have them served by messenger on Mr. Cazares.

THE COURT: It's up to you.

MR. KOTLER: I would think by the 5th.

THE COURT: Is that all right with you?

MR. CAZARES: That's fine, Your Honor.

THE COURT: All right. That's fine.

MR. CAZARES: I don't ask that he serve both counsel.

THE COURT: That's fine.

MR. CAZARES: Thank you very much, Your Honor.

THE COURT: All right. Thank you, Mr. Kotler. Thank you, Mr. Cazares.

(p. 8) MR. CAZARES: Thank you, Your Honor.

THE COURT: Here are the verdicts. You can take them if you want to and discuss them with your clients if you'd like. Mr. Kotler's clients are not here. And then we'll both make a copy for you.

MR. CAZARES: I'll make sure the copies are made.

MR. KOTLER: Is that going to be done now?

THE COURT: It will be done now.

(Proceedings were concluded.)

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(p. 9) (Caption omitted in printing)

### CERTIFICATE

I, REBECCA RIMSON, hereby certify that I am a duly appointed, qualified and acting official court reporter for the United States District Court, Central District of California.

I further certify that the foregoing 8 pages comprise a true and correct transcript of the proceedings had in the above-entitled cause on October 7, 1980, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this ..... day of December, 1980.

.....  
Official Reporter

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(p. 1) (Caption omitted in printing)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, January 19, 1981

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(p. 3) I N D E X

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(p. 4) LOS ANGELES, CALIFORNIA, MONDAY,  
JANUARY 19, 1981, 10:00 A.M.

THE CLERK: Item No. 2, Civil 76-1803, Santos Rivera versus City of Riverside. Counsel; please make your appearance.

MR. CAZARES: Good morning, Your Honor. Roy Cazares appearing on behalf of the plaintiffs.

MR. LOPEZ: And Gerald P. Lopez appearing on behalf of the plaintiffs, Your Honor.

MR. KOTLER: Jonathan and Patti Kotler for the defendants, your Honor.

THE COURT: All right. I have been through all of these papers and I understand full well what the positions of the parties are here. I am going to give you an opportunity to say whatever you want to.

But I will tell you initially that my feeling is that there was an excellent job done by Mr. Lopez and Mr. Cazares, and that it was a difficult case and it did take a lot of time. That is nothing to take away from the presentation you made, Mr. Kotler. I also say that you did a good job.

My feeling is that there should be attorney's fees granted to you in the amount that you suggested. I have my doubts about whether there should be a multiplier. (p. 5) That is a lot of money for attorney's fees.

The only other thing I would say is that there is no doubt whatsoever but that the jury found liability here. it doesn't make any difference what the jury thought about the amount of damages.

The jury may very well have thought that the damages were not any greater than what they were because

they were sympathetic to the police perhaps. Perhaps it was that you tried it in the straightforward way you did.

I mean, one of the things I liked about the trial was it seemed to me that there was no attempt to whip this up into a major confrontation between this family, the members of this family, and the police. The feelings were high enough while it was going on.

If there had been—if either counsel had misbehaved during the trial in the sense that you would have whipped up the feeling, it would have been a very bad thing for the future, for their future in the community and for the police.

But I read some of the comments that were made after the trial was over, and how you can say that you won when there were more than 30 jury verdicts finding you liable, I really don't know.

MR. CAZARES: That disturbed me.

THE COURT: Well, that is all right; it disturbed (p. 6) the Court also.

Now the Court was called by the press and we try not to talk about cases, especially cases like that, because everything that you say causes more consternation on either side. But there is no doubt about the fact that you prevailed in that case and, therefore, you get the attorney's fees.

Now the question is: How much attorney's fees do you get.

The first part of that is: What is the proper hourly rate. The proper hourly rate is \$125 an hour, in my opin-



ion. And you get the amount that it costs for the staff that you have mentioned in there.

Now that's my preliminary feeling. No one can dissuade me from one thing, and that is: That the plaintiffs prevailed.

You see, one of the problems was that you had some of your people take the stand and they look as if they were not—they look as if they have survived this ordeal. They didn't look—

They looked intelligent; they looked as if they could handle it emotionally. That may have caused the jury to say, "Well, you know, if we give them an award it shouldn't be so much that the police would be personally forced to pay the judgment."

(p. 7) But you prevailed and you get the attorney's fees, and you get them at \$125 an hour.

You can say anything you like after that, but no one, no one can tell me that you did not win that case, because you did.

MR. CAZARES: Thank you.

THE COURT: All right. Now if you'd like to sit down. Now either side can start, say anything you want to.

MR. KOTLER: There are two motions before the Court, first.

THE COURT: Yes, there are. We can take them in either order. You have a motion and they have a motion.

I don't intend to give you any attorney's fees.

MR. KOTLER: That is on the summary judgments?

THE COURT: I don't think that that is appropriate.

MR. KOTLER: Might I inquire as to the Court's reasoning.

THE COURT: You just heard me. I mean, you got some summary judgments granted, there is no question about that. But that was a rather quick process that you went through and it seems to me, since I don't usually give summary judgment attorney's fees, I don't think it is appropriate in this case.

(p. 8) MR. KOTLER: I will speak to the other motion.

THE COURT: In fact, I have never given attorney's fees in a summary judgment. After a jury trial, that is different.

Yes.

MR. KOTLER: A couple of things I want to make sure the Court is aware of.

To the extent that there were comments made to the press, I think the Court will search forever to find any comments that I made to the press about this case.

THE COURT: Now, Mr. Kotler, if I thought you made the comments I would have said you made them. You didn't make them. But I am making clear here in open Court as opposed to on the telephone with the various members of the press who called me, and media people, that you cannot have that many verdicts for the plaintiffs and say that the defendants won. That is impossible; it can't be.

Now the fact is that you did a good job of defending the police department and under those circumstances the jury verdicts were not particularly high. That may also be because of the fact that it was not quite as clear how they reacted to the arrest and the circumstances of the arrest.

But in any event, I am not quarreling with the (p. 9) jury's verdict and their judgment. I am just saying that nobody can say that the plaintiffs did not prevail, because they did.

MR. KOTLER: I think it is clear that they prevailed as to those parties and claims that they prevailed on.

I think the record is also clear that while it is true that the plaintiffs did receive, as the Court pointed out a few minutes ago, some 30-plus jury verdicts, it is also true that the defendants received some 220-plus dismissals.

I think it is also clear that while six of the defendants of the 32 that were sued had judgments rendered against them, that 26 did not.

I think, your Honor, there is just a couple of things I'd like to mention.

THE COURT: Let me ask you something, Mr. Kotler.

Suppose, just suppose that you had been involved in that situation and you had been one of the people who was arrested and taken in. And consider all the circumstances that occurred. Would you have known what participation there was of each one of the officers?

MR. KOTLER: I think, your Honor, when almost a year passes between the time I was arrested and taken in

(p. 10) and the suit is filed, a year in which discovery could have been taken, and then people who are sued who weren't even on duty that night, weren't even there, weren't on duty, had nothing to do with it, I think I would know that.

THE COURT: How did they know? I mean, you have got a situation there where you have got teargas and people being herded out into the street. I don't think under those circumstances that the people who were in and around the house had much of an opportunity to take down the badge numbers of those officers.

MR. KOTLER: I think it is clear that the people who were arrested that night did not. I think it is equally clear that the attorneys who filed the lawsuit did.

THE COURT: Well, I think even up to the point of the trial—and I will just say this for the record—even up to and including the time the testimony was taken at the trial, what each one of those officers did wasn't even clear from what they said themselves.

MR. KOTLER: I think that is so, your Honor, but you have to remember that at that point, at the time of the trial, 18 police officers had been let out by Judge Ferguson in this case because it was found by him that they had absolutely nothing to do with what happened.

THE COURT: I don't see how, I really absolutely don't see how, aside from taking the deposition of 50 officers, (p. 11) in which event there would have been objection and all kinds of motions made, I don't see how they would have known who it was who did what. Under the circumstances, I don't see how.

MR. KOTLER: I think as a starting point, finding out who was on duty that night would have been real easy. This wasn't done.

THE COURT: Well, they were in and out of the lawsuit fairly rapidly based on the fact that they weren't there.

MR. KOTLER: Close to three years after the incident took place.

THE COURT: And what happened to them in the interim? They served on the police department and life went on as usual.

MR. KOTLER: I am sure the Court doesn't want me to argue.

THE COURT: No, no. There is really no point in pursuing it any further. You have got your position and I am telling you what I think about it.

MR. KOTLER: What I did want to speak to this morning, your Honor, is a few things in the motions filed by the plaintiffs.

I wasn't able to find one case reported anyplace by any District Court in the United States where injunctive (p. 12) relief was not granted to plaintiffs that awarded to successful litigants' attorneys in a civil rights case anything even approaching one-third of the amount of a jury verdict.

And those cases are few and far between, those that went that high. The key to large awards, it seems in the reported cases, civil rights cases, is always injunctive relief.

Initially, as the Court will recall, injunctive relief was sought in this case but plaintiffs didn't prevail on their claim for injunctive relief and none was awarded.

Apparently the division of labor employed by the plaintiffs' attorneys here was a novel one.

THE COURT: They could still ask for the injunctive relief. They just didn't press that. They haven't pressed it yet.

MR. KOTLER: They didn't prevail on it.

THE COURT: You mean from the jury?

MR. KOTLER: From the jury, yes, your Honor.

THE COURT: Well, the jury has no right to give injunctive relief.

MR. KOTLER: They dropped the claim, as I recall.

THE COURT: Well, go on.

MR. KOTLER: I don't recall that was even tried.

(p. 13) But in any event, the division of labor employed by the plaintiffs here appears to be a novel one. When in doubt, they did things twice.

And now they are asking the Court to sanction that kind of double billing. I am taking these numbers, your Honor, directly from the affidavits filed by Mr. Lopez and Mr. Cazares.

First of all, they have 92.25 hours for work performed in action CV 78-2076. That is a totally different action. It is an action that is not before this Court. It is an action that was not tried.



It is a malicious prosecution action brought by one Richard Albee. They have asked for and apparently they are receiving the sum of \$11,531.25 for work performed in another action.

There is 197 hours of conversations between Mr. Lopez and Mr. Cazares. Nothing more —

THE COURT: I haven't got any doubt that it probably took 250 hours of conversation about the case between the two of them.

MR. KOTLER: No, I just want to point this out, your Honor.

There are notes of Mr. Lopez's second affidavit which says, "Notes for Cazares," things that he was trying to educate Mr. Cazares on; 45½ hours, \$6,000.

(p. 14) Mr. Lopez spent 59 hours preparing jury instructions that this Court largely threw out; \$7,000.

THE COURT: No, I didn't. No, I didn't. I think those were good jury instructions. I tried to pare down the jury instructions so that they'd be fair on both sides. I may have pared them down so much that I could have caused the lower verdicts.

MR. KOTLER: There is 143 hours just on Mr. Lopez's time alone, your Honor, for preparing the pretrial order; \$17,906.25 at \$125 an hour.

I might add, the record is also clear in this case that the pretrial order — that there were some 20-odd pretrial conferences, almost without exception continued either because the Court wasn't prepared to hear it — not your Honor necessarily — or because Mr. Lopez or Mr. Cazares



asked for a continuance. Each time it was prepared, Mr. Cazares came up here to Los Angeles. Mr. Lopez didn't appear except on rare occasions. This is time that they have billed on this method.

There was review of one set of further answers to interrogatories by Mr. Lopez; 23 hours.

There is time that Mr. Cazares put down in his time slips as "standby time." This is while Mr. Lopez was here in Los Angeles. Mr. Cazares asked for the sum of \$5,687 while he was standing by in Los Angeles. Mr. (p. 15) Lopez could have been just as easily standing by.

Then there is the review of the same documents by these two individuals, documents that I sent to them, and they have asked the Court for 115 hours' time on review of documents. It is over \$14,000.

What this really reminds me of, your Honor, if the Court will bear with me for a moment and then I will finish, is a story I heard recently about an attorney who died, and he went up to heaven.

He got up to the pearly gates and Saint Peter was there. He said, "I want to congratulate you. You are the first attorney that we have ever admitted to heaven."

And the attorney was very flattered. He said, "How come?" An Saint Peter said, "Because we were looking for somebody who had great years of experience in counseling and since you have been an attorney for 107 years, you fit the bill."

The attorney thought for a minute and said, "There must be some mistake. When I died, — I died yesterday of a heart attack — I was 43 years old."

And Saint Peter said, "There must be some mistake." He called his communique control officer. And he hung up the phone and he said, "No, you are 107 years old."

And the attorney said, "I don't understand how (p. 16) you got that."

Saint Peter said, "Simple: We got it from your time slips."

I think that is what is happening in this case. Thank you.

THE COURT: Well, that may be, but I don't feel that way about it.

Now what is the number of the other action?

MR. KOTLER: CV 78-2076, you Honor. It is called Albee, I think, versus Rivera.

THE COURT: Yes, yes. All right.

MR. LOPEZ: May I respond?

THE COURT: Yes, certainly.

MR. LOPEZ: Let me address myself to the question of whether we are entitled to fees on that. In the event this repeats anything the Court is already aware of, bear with me.

One summary judgment was granted to the individual police officers. They jointly filed suit against both our clients and Mr. Cazares and myself.

THE COURT: Yes.

MR. LOPEZ: But rather than in this case as some form of cross-complaint as a malicious prosecution, in the State Court in the County of Riverside.

I immediately moved to remand the case to this (p. 17) court at that time with Judge Ferguson on the basis of this principle: That essentially the question that was before the State Court in Riverside was whether or not there was reason to believe that the claim that we brought was brought in good faith as a 1983 claim: "Was it a federal question."

Because Judge Ferguson agreed with my conclusion that, indeed, it was, he took jurisdiction over the case and dismissed it.

THE COURT: That is what is referred to in your papers.

MR. LOPEZ: And that is what defendants' counsel would have the Court not include as part of the primary action when, indeed, essentially all that was done in the State Court by Mr. Kotler on behalf of the 18 summarily adjudged defendants was to bring what essentially was a cross-complaint, something that we are clearly entitled to by all the law that exists on attorney's fees.

The question of injunctive relief actually was something I wasn't going to address before the Court and I can tell you quite simply why not. While it was clearly not a question brought to the jury, since the jury has nothing to do with granting equitable relief, —

THE COURT: Nothing, no.

MR. LOPEZ: — we thought hard and long about precisely what entitlements we had for any of our plaintiffs (p. 18) with respect to some kind of future equitable relief.

But the bottom line of what we would ask for is that the police officers obey the law. And that is virtually always denied by a court because a court properly, I think, says that for the future we will assume that all police officers will abide by the law, including the Constitution.

So that we brought nothing and have pursued nothing; indeed because we too agree with the Court that that will happen.

THE COURT: Now let me just say one thing for the record, and that is: That the plea was in there for injunctive relief. There wasn't any reason to pursue it, I suppose. But if you had asked for it against some of those officers I think I would have granted it.

MR. LOPEZ: I hope I can accept that as a proposition that says that in the event that anything happens in the future concerning those officers or our clients in the City of Riverside, that this Court will remain available for any appropriate equitable relief.

THE COURT: I would agree with you that there is a problem about telling the officers that they have to obey the law. But if you want to know what the Court thought about some of the behavior, it was — it would have warranted an injunction. There cannot be a piece of (p. 19) evidence more appalling than the piece of evidence about the officer singing from the helicopter. There can't be any behavior more reprehensible than that, in my opinion.

Now I will not comment on some of the rest of it because part of the rest of the behavior at the time that this occurred was due to the fact that they didn't know what they were doing and they had nobody to tell them what

they should do. There was no direction and they just simply lost their heads, totally. That is my opinion from the evidence.

I will not go to castigate the officers, but in my opinion this was really a very sad day for that police department.

MR. LOPEZ: Thank you, your Honor. That is all I have.

THE COURT: I intend to give the attorney's fees.

MR. LOPEZ: Thank you.

THE COURT: All right. So the attorney's fees, not multiplied, are awarded, and the costs. You will prepare an order to that effect, please, and give it to the Court to sign.

MR. CAZARES: Yes, your Honor. Should we prepare the judgment as well, your Honor?

THE COURT: Yes, yes. Now let me see. The (p. 20) order that you do must deny the defendants the attorney's fees and grant them to you. Then you prepare the judgment and submit it.

Now is there anything left over? There is nothing left, is there?

MR. LOPEZ: The only thing that is left, your Honor, is — might I explain?

THE COURT: Yes.

MR. LOPEZ: The history of this case that was filed in the State Court in the County of Riverside is, I think, accurately described as "peculiar."

After it was dismissed by Judge Ferguson there was a disagreement between Mr. Kotler and Judge Ferguson, one that frankly we were on the outside of, as to whether or not it should be dismissed with or without prejudice.

In fairness to Mr. Kotler and the defendants, what Judge Ferguson intended was an order dismissing it with prejudice because he thought at that time that in order to comply with some federal version of a malicious prosecution claim there had to be a final order from which the defendants could move, and that a summary judgment in the context of a larger case was not a final order.

Mr. Kotler disagreed, claiming that if you dismiss it with prejudice, even with that meaning, that they shall — that is, the 18 summarily adjudged defendants — (p. 21) be forever foreclosed from bringing this claim again.

Mr. Kotler took it up on appeal, where he and Cazares argued before the Ninth Circuit. The Ninth Circuit essentially said, "What is it that you want?"

And Mr. Kotler said, "Simply not to be foreclosed in the future."

Both our papers and Mr. Cazares in oral argument said, "We understand that that is not the case and we don't mean to misconstrue what Judge Ferguson always had intended to do," in which case the order of the Ninth Circuit was handed down consistent with that.

What remains, however, is not only the possibility, but I suspect the likelihood, that both our clients and Mr. Cazares and myself will again be sued in the Riverside Court on the basis of this malicious prosecution that we had already once successfully removed. So that I strongly



suspect that we will be before this Court again on a case intimately related to the case that was tried before this jury, and go forward on that.

And that is all that remains.

THE COURT: I suppose that, if that is the kind of judgment which is being exercised, that is the kind of judgment that is being exercised, and it will come to me.

MR. LOPEZ: Thank you, your Honor.

MR. KOTLER: Your Honor, rather than argue that (p. 22) point, I don't want anything that Mr. Lopez said to be deemed an acceptance by me of the truth of what he just said.

THE COURT: I understand that.

MR. KOTLER: Thank you, your Honor.

THE COURT: Yes. I hope better judgment than that prevails. You know, there has to be an end to things at some point.

All right. You prepare those orders. I would hope that you could do that quite soon.

MR. CAZARES: Thank you, your Honor.

MR. LOPEZ: We will. Thank you, your Honor.

MR. KOTLER: Your Honor, how much time will I have to review the proposed judgment?

THE COURT: I would think that if you get it done this week and give it to him, you can look at it and put into the court next week whatever you have in mind and then I will sign it before the end of the month.



MR. LOPEZ: That is fine, your Honor. Thank you, your Honor.

MR. CAZARES: Thank you.

THE COURT: Thank you.

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(Caption omitted in printing)

# REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, October 24, 1983

BARBARA BROSNAN, CSR

Official Reporter

412 United States Courthouse

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Los Angeles, California 90012

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## (p. 3) I N D E X

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(p. 4) LOS ANGELES, CALIFORNIA; MONDAY,  
OCTOBER 24, 1983; 10:00 A.M.

THE CLERK: Item No. 1 on the calendar, Civil 76-1803, Santos Rivera versus City of Riverside. Counsel, please make your appearance.

MR. KOTLER: Good morning, your Honor. Jonathan Kotler for the defendant, City of Riverside.

MR. PATTERSON: Patrick Patterson for the plaintiffs.

THE COURT: All right. We have notice that today we are filing and spreading the mandate. Now the question is: Would I change my mind about the attorney's fee award based on all of the factors that I must take into consideration.

Now, I have read the papers and so I think I'd rather hear from Mr. Kotler.

MR. PATTERSON: Fine, your Honor.

MR. KOTLER: Your Honor, it is my understanding under Hensley that certain findings have to be made. I don't think that there is sufficient documentation in the file to enable the Court to make those findings. That's been our position all along.

THE COURT: Which findings can't I make?

MR. KOTLER: Well, there hasn't been word one in the motions or in any of the declarations with respect to what their billing rate was. There hasn't been anything in the file with respect to what their expertise was. There's (p. 5) been no finding by the Court with respect to—

THE COURT: No, you are wrong about that. About their expertise?

MR. KOTLER: Other than their own declarations.

THE COURT: Who has to say anything about it?

MR. KOTLER: It seems to me that there is a declaration by an attorney in Century City, under penalty of perjury, that says that based on these two individuals' request, the request is justified both on their hourly rate and their expertise. He never says that he knows either of them. It seems to me that the only finding with respect to hourly rate is by this individual at Irell and Manella.

THE COURT: Now, you understand, Mr. Kotler, that the United States Supreme Court is not saying, in sending the matter back, and the Ninth Circuit is not saying, in sending the matter back, that the award is wrong or not supported. It merely wants the Court to give it some more findings. You are now technically telling me that there is no basis for deciding that those two lawyers

were expert? I watched them. Would you quarrel with their expertise?

MR. KOTLER: Certainly, I would, just based on the results obtained, which is one of the things that Hensley talked about.

THE COURT: You mean because they only won— was it 37, 37 of their claims?

(p. 6) MR. KOTLER: No, your Honor. They only won on three of their claims, three of the theories of — well, I have that. They only won —

THE COURT: I know, I understand.

MR. KOTLER: Well, your Honor said 37 claims. In fact, they never pled 37 claims.

THE COURT: No, I am talking about in all — I have forgotten the exact number, but there were a lot of verdicts in there.

MR. KOTLER: There were a lot of verdicts and there were something like seven or eight times that many verdicts for the defendants. There also was a judgment of \$33,350 on a case where the offer had been within \$8,000 —

THE COURT: When had the offer been within \$8,000?

MR. KOTLER: Prior to trial, to Mr. Cazares. I made it myself. It was a \$25,000 offer. I noticed in Mr. Patterson's paper there was talk about a \$10,000 offer, and there was years before —

THE COURT: You, in my presence, offered them \$10,000.

MR. KOTLER: I did, your Honor.

THE COURT: And that is all you offered them.

MR. KOTLER: No, your Honor, that is not correct.

THE COURT: All right. Now, Mr. Patterson, let me hear from you.

(p. 7) MR. PATTERSON: Well, in our view, your Honor, the only question before the Court, in light of Hensley, is whether the Court has to enter a more specific finding as to the amount of the fee being justified by the level of success. We think there is adequate material in the record to support that finding and we'd ask the Court to enter that finding and enter the judgment for the amount of the attorney's fees.

THE COURT: Let me ask you this, Mr. Patterson: Do you think I have to make a finding on the 12 factors that are in *Johnson v Georgia Highway Express*?

MR. PATTERSON: No, your Honor. I think that the Ninth Circuit in *White v City of Richmond*, a very recent case that was cited in our papers, —

THE COURT: Yes.

MR. PATTERSON: — has indicated that that level of specificity is not required. The Supreme Court in *Hensley* as well indicated that a number of the *Johnson* factors were already implicated in the earlier parts of the test that the Court described in *Hensley*, so we don't think you have to make additional findings as to all those factors, but merely to specify why it is the Court believes that the amount of the fee is justified by the level of success that the plaintiffs obtained in the case.

THE COURT: Say it again. Why the plaintiffs are (p. 8) entitled to the attorney's fees based on the level of success?

MR. PATTERSON: That is apparently the finding that the Supreme Court has required the Court to make in the Hensley case.

THE COURT: Well, let me pursue this a little further with you. You think that the Court can't make an award of attorney's fees in the amount that the Court did make if the recovery is \$33,000? Do you think I can't give anything more than the thirty-three?

MR. PATTERSON: No, certainly not, your Honor. I think that the Hensley case and the White v City of Richmond case both indicate that that is not the test that is supposed to be applied.

THE COURT: I didn't think so.

MR. PATTERSON: I think the Court's award clearly is justified by the circumstances in this case. All the Court is required to do under Hensley is to make more explicit its reasoning in finding that that amount of fees was justified by the circumstances of this case.

The Court did that to some extent in the findings it had already entered, which were similar to the District Court's findings in the Hensley case in the Supreme Court.

THE COURT: Very similar.

MR. PATTERSON: Very similar.

(p. 9) THE COURT: I didn't just make the award. I did say what I thought about the case.

MR. PATTERSON: Yes, your Honor.

THE COURT: And the way it was handled. I certainly though there was a basis for the award.

MR. PATTERSON: But the problem is the Supreme Court apparently wants a more explicit statement of the basis for the award where the plaintiffs have prevailed on fewer than all the claims that are asserted, which is the situation here. But the fact that the plaintiffs only obtained damages and not injunctive relief is not determinative, nor would it be determinative if it were vice versa. These rights are by their nature nonpecuniary.

The legislative history underlying the Section 1988 makes it clear that that is not the sole criterion; that it would discourage rather than encourage civil rights litigation to restrict fees in that way. That, I think, is not what the Supreme Court is trying to suggest in the Hensley case and, certainly, the Ninth Circuit did not suggest it in the White case.

THE COURT: Now let me go back to you, Mr. Kotler. Are you telling me that you don't think there is in the file any declaration indicating what their hourly rate was and the number of hours they spent?

MR. KOTLER: What their hourly rate was?

(p. 10) THE COURT: Yes.

MR. KOTLER: Yes, your Honor.

THE COURT: There is nothing in there?

MR. KOTLER: I don't recall that there was.

THE COURT: Well, Mr. Patterson, I will have to look back because I wouldn't have made an award of at-



torney's fees if I didn't have the number of hours and I didn't have the hourly rate, and the Ninth Circuit wouldn't have affirmed it. And you noticed they did.

MR. KOTLER: Your Honor, my memory is my memory. I recall that they asked for attorney's fees at the rate of \$125 an hour and that is what the Court awarded. I also recall a declaration by each of them that they were fresh out of law school when the case started and I recall nothing about what they were charging at the time.

THE COURT: They were two of the best lawyers who have ever appeared in a civil rights case here in this courtroom, and they did an absolutely superb job. Everything that they submitted in writing was well done. The way Mr. Cazares handled that trial and the dignity with which those plaintiffs acquitted themselves I thought reflected admirably on him.

MR. KOTLER: Your Honor, the Court asked me if there was anything in the file with respect to what their hourly rate was and my recollection is there was not.

(p. 11) THE COURT: I am sure there must be because I would not have given that award if I had not found it there.

All right. I will look back on it. I tell you now that I will not change the award. I will simply go back and be more specific about it. If for any reason Mr. Kotler is correct, and I don't think he is, I will probably need another hearing with you.

MR. KOTLER: Will we receive notification by the clerk with respect to that additional hearing?

THE COURT: Yes, if I need it. I will look back and see what was said in the declarations. All right. Thank you.

MR. KOTLER: Thank you.

MR. PATTERSON: Thank you, your Honor.

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Barbara Brosnan  
Official Reporter

11/8/83  
Date

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8  
No. 85-224

Supreme Court, U.S.

FILED

DEC 16 1985

JOSEPH E. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**

October Term, 1985

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CITY OF RIVERSIDE, LINFORD L. RICHARDSON,  
MICHAEL S. WATTS, DAN PETERS, GERALD MIL-  
LER, and ROBERT PLAIT,

*Petitioners,*

vs.

SANTOS RIVERA, JENNIE RIVERA, DONALD RI-  
VERA, JEROME RIVERA, LEE ROY RIVERA, MARK  
LARABEE, ENRIQUE FLORES, AND MANUEL  
FLORES, JR.,

*Respondents.*

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**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**BRIEF FOR THE PETITIONERS**

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## **QUESTIONS PRESENTED**

### **1.**

Whether “a reasonable attorney’s fee” awarded under Section 1988 of Title 42 of the United States Code must bear some proportionality to the amount of the judgment obtained by the party seeking such fees in a case in which monetary relief only was pursued and/or obtained.

### **2.**

Whether an award of attorney’s fees under Section 1988 of Title 42 of the United States Code more than seven times the amount of a judgment obtained in a suit for monetary relief only constitutes an abuse of discretion by the trial court.

## **PARTIES INVOLVED**

The following parties have an interest in the outcome of this case:

SANTOS RIVERA, JENNIE RIVERA, DONALD RIVERA, JEROME RIVERA, LEE ROY RIVERA, MARK LARABEE, ENRIQUE FLORES, MANUEL FLORES, JR., Plaintiffs and Respondents;

ROY B. CAZARES, GERALD P. LOPEZ, Attorneys at Law;

CITY OF RIVERSIDE, LINFORD L. RICHARDSON, MICHAEL S. WATTS, DAN PETERS, GERALD MILLER, ROBERT PLAIT, Defendants and Petitioners.

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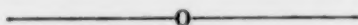
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## **OPINIONS AND JUDGMENTS BELOW**

The June 27, 1985 opinion of the United States Court of Appeals for the Ninth Circuit, which herein is sought to be reviewed, appears in the Joint Appendix (hereafter, J.A.), at pp. 193-198 thereof. No rehearing was sought. The Ninth Circuit's opinion affirmed the second award of attorney's fees herein, made by the United States District Court for the Central District of California, as represented by its order and findings of fact and conclusions of law, both of June 26, 1984 (J.A. pp. 185-186 and 187-192).

The said June 26, 1984 award of attorney's fees followed this Honorable Court's prior grant of certiorari herein on May 31, 1983, reported at 461 U.S. 952, 103 S.Ct. 2421, which appears at J.A. p. 184. The said grant of certiorari by this Honorable Court also included an order vacating the District Court's initial award of attorney's fees, made on April 3, 1981, after which an unsuccessful appeal was taken by petitioners to the Ninth Circuit, which affirmed the District Court's first award of attorney's fees on June 15, 1982. The District Court's initial award of attorney's fees, as evidenced by its judgment and findings of fact and conclusions of law, appear at J.A. pp. 166-172 and 173-175. The opinion of the Ninth Circuit affirming said award, reported at 679 F.2d 795, appears at J.A. pp. 176-183.



## **JURISDICTION**

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 27, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

This case involves § 1988 of Title 42 of the United States Code, which at the time of the trial herein, provided, in part, as follows:

“ . . . In any action or proceeding to enforce a provision of sections of 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.”

The aforesaid statute was amended, effective October 1, 1981. The amendment, however, does not affect this case. Amended § 1988 now provides, in part, as follows:

“ . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of the United States Internal Revenue Code or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.”

—o—

## **STATEMENT OF THE CASE**

On August 1, 1975, respondents were attending a large private party on the grounds of and in a home owned by two of the respondents in Riverside, California, when police officers entered, declared an unlawful assembly, forcibly broke up the party, and arrested many of the guests, including four of the respondents. The four respondents were arrested and later prosecuted, but the charges

against were dismissed for lack of probable cause. On June 4, 1976, all eight respondents filed suit against the City of Riverside, its chief of police, and thirty police officers, alleging violations of the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, violations of 42 U.S.C. §§ 1981, 1983, 1985(3), and 1986, and pendent state claims for conspiracy, emotional distress, assault and battery, bodily injury, property damage, breaking and entering a residence, malicious prosecution, defamation, false arrest and imprisonment, and negligence. Respondents sought compensatory and punitive damages, injunctive and declaratory relief, and attorney's fees. In sum, the eight respondents herein presented separate claims against 32 defendants, for a total of 256 individual claims.

However, 17 of the defendant police officers were dismissed by the original trial judge after vigorously contested motions for summary judgment in January, 1978 (See Memorandum Opinion and Order and Judgment, J.A. pp. 7-13). In addition, five of the remaining six officers who moved for and were denied summary judgment, despite opposition from respondents, were found after trial to have no liability to any of the respondents on any theory whatsoever.

Prior to the trial, respondents dropped their requests for injunctive and declaratory relief, along with their original allegation that the police officers had acted with discriminatory intent. Thus, the trial went forward as a simple suit for monetary relief by the eight respondents herein, against the City of Riverside, the chief of police, and 14 of the remaining officers.

After a nine day trial, the jury returned a verdict exonerating another nine of the individual defendants from liability, and awarding \$33,350 to respondents based on 11 violations of § 1983, four instances of false arrest and imprisonment, and 22 instances of common negligence. No single respondent achieved a jury award larger than \$8,500. No individual defendant above the rank of lieutenant was found to have any liability to any of the respondents.

Respondents did not prevail on any of their remaining theories of liability, no restraining orders or injunctions were ever issued against any of the defendants, and the City of Riverside was not compelled to, and did not, change any of its practices or policies as a result of the suit.

On December 5, 1980, respondents filed a post-trial motion for attorney's fees pursuant to 42 U.S.C. § 1988. In responding thereto, petitioners objected to any fee award that was disproportionately large in comparison to the amount of the monetary judgment recovered (J.A. pp. 72-75). Petitioners were to repeat this argument unsuccessfully at every stage of the proceedings thereafter.

On April 3, 1981, the trial court awarded to respondents attorney's fees in the sum of \$245,456.25. This award represented to the penny the amount of attorney's fees which the respondents had requested, less their out of pocket expenses, and without a multiplier, also requested.

Petitioners appealed the award, and on June 15, 1982, the Court of Appeals affirmed (*Rivera v. City of Riverside*, 679 F. 2d 795 (9th Cir. 1982); J.A. pp. 176-183), specifically rejecting petitioners' arguments regarding the



disproportionality between the amount of attorney's fees awarded and the jury verdict, stating that "[t]he extent to which a plaintiff has 'prevailed' is not necessarily reflected in the amount of the jury verdict." (*Rivera v. City of Riverside*, *supra*, 679 F. 2d at 797; J.A. p. 181) However, this Honorable Court granted certiorari, vacated the award of fees, and remanded the case for further action in light of *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1333 (1983). (*City of Riverside v. Rivera*, 461 U.S. 952, 103 S.Ct. 2421 (1983); J.A. p. 184)

On remand, the District Court reinstated its previous award of attorney's fees in the same amount as before (J.A. pp. 185-192), and the same Court of Appeals panel which had heard the first appeal, once again affirmed the trial court's award of attorney's fees in the sum of \$245,456.25 (J.A. pp. 193-198), specifically rejecting the need for any relationship between the amount of damages awarded to the prevailing party and the amount of attorney's fees awarded (J.A. p. 196).

Certiorari was granted by this Honorable Court on August 9, 1985.

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### SUMMARY OF ARGUMENT

In order to understand petitioners' claim that the award of attorney's fees in the sum of \$245,456.25 was not "a reasonable attorney's fee" under § 1988 of title 42, a complete comprehension of the factual context in which the attorney's fees were made is mandated. This necessitates both a knowledge of what the instant case was about, as well as an understanding of what it was not about.



It was not a class action. Rather, eight individual plaintiffs sued for damages in their names alone, rather than in any representative capacity.

It was not a case which sought, at trial, injunctive, declaratory, or any other type of relief, other than money damages.

It was not an action in which the jury was asked to decide whether there had been any pattern or practices of discrimination by the municipal defendant, or by any of its employees. Such claims were dropped by respondents prior to trial.

It was not a case in which either the City of Riverside, or its police department, was compelled to, or did change any of its practices or policies.

It did not involve any evidence, at trial, of damages as a result of any physical injuries inflicted at the hands of any of the defendants.

It was not a lawsuit in which any police officer above the rank of lieutenant was found to have any liability to any of the respondents, although the chief of police was sued and forced to endure more than four years of litigation before being totally exonerated at trial.

In fact, with one glaring exception, this was not a case in which respondents, by any rational standard, achieved very much success. They brought a myriad of claims against 32 defendants, but were forced to drop many of these claims prior to trial. Ultimately, they were successful against only six of the 32 defendants sued, and on precious few of their original claims (see "Statement of the Case" herein). Furthermore, although they sought mil-

lions of dollars in damages, after nine days of trial, the jury valued all of respondents' claims—most of which were pendent state claims—at a grand total of \$33,350, with no single respondent being awarded more than \$8,500. Why was there such a disparity between the amount sought by respondents and the amount awarded by the jury? Because as the jury foreman, Renee Wong, said,

“We wanted the Riveras to get something for putting up with the case for five years. But we didn't see any strong evidence to tell us to give them a whole lot of money, either.” (J.A., p. 113)

In other words, having chosen to pursue this matter as one solely for money damages, respondents, in the eyes of the jury, failed to prove much of a case.

Still, the one glaring exception to respondents' lack of success herein was their achievement of an award of attorney's fees totally disproportionate to the judgment, *exceeding by more than seven times the sum awarded by the jury at trial*.

However, it was in this achievement that not only was the intent of Congress in enacting § 1988 badly twisted, but that the guidance given by this Court, in *Hensley, supra*, and in *Blum v. Stenson*, — U.S. —, 104 S.Ct. 1541 (1984), as well as the guidance of other courts, wholly ignored, as well.

The award of attorney's fees herein compensated respondents for every minute of every hour for which they sought compensation, with no reductions of their submitted time whatsoever.

It was an award which compensated them for claims on which they succeeded, as well as for those on which they did not succeed.

It was an award which paid two relatively novice attorneys the sum of \$125 per hour for travel time, duplicated time, non-litigation time, pre-litigation time, post-litigation time, time spent litigating against defendants who were found to have no liability to any of their clients, as well as for time spent sitting in a hotel room.

It was an award made without the trial court having access to any time records prepared contemporaneously with the services for which respondents sought compensation.

It was an award made despite an almost total lack of "billing judgment" (*Hensley, supra*, 461 U.S. at 434, 103 S.Ct. at 1939-1940) having been exercised by respondents' attorneys.

It was an award made by the District Court in contravention of an order by this Honorable Court that the award of attorney's fees previously ordered herein be further considered in light of *Hensley, supra*.

It was an award which was neither proportionate to the amount received by the respondents at trial, nor reflective of the degree or nature of success achieved by respondents at trial.

¶

And thus, for all these reasons, it was an award of attorney's fees which not only was not "reasonable," but, in addition, was one which constituted an abuse of discretion by the trial court, as well.

## **ARGUMENT**

### **I. Awards Of Attorney's Fees Greatly Disproportionate To The Amounts Recovered In Cases Which Seek Only Monetary Relief Ignore The Purpose Of § 1988, Which Is To Provide Court Access For Litigants, Rather Than Windfall Fees For Their Attorneys**

The award by the trial court herein of attorney's fees seven times in excess of the amount recovered by respondents at trial, in a case which sought monetary relief only, constitutes a total disregard of the stated purpose of Congress in enacting § 1988. Indeed, in its recent decision in *Hensley, supra*, this Court pointed out that § 1988 was enacted "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley, supra*, 461 U.S. at 429, 103 S.Ct. at (quoting H.R. Rep. No. 94-1558, p. 1 (1976)). Providing access for litigants, however, is far different than providing a low risk opportunity for attorneys to greatly increase their incomes.

To its credit, Congress was aware of the potential for abuse that such a fee-shifting statute might engender. Thus, § 1988, as written and passed, provided only for "reasonable" attorney's fees. Such a fee standard was consistent with congressional intent that any attorney's fees to be awarded under § 1988 be "adequate to attract competent counsel," yet not so large as to "produce windfalls to attorneys." S.Rep. No. 94-1011, p. 6 (1976); see also H.R. Rep. No. 94-1558, p. 9 (1976).

While Congress did not provide the courts with any strict definition of what a "reasonable" fee was to be, it did, however, provide clear and useful guidelines to enable the district courts, which were to implement the statute,

to do so within the framework of a proper exercise of their discretion and consistent with congressional intent. Both the Senate and the House reports accompanying § 1988 refer the district courts to the twelve factors set forth in the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Use of the *Johnson* factors as a test for determining the proper measure of attorney's fees under § 1988 was expressly adopted by the Ninth Circuit in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975). And as this Court noted in its *Hensley* decision, *supra*, one of the *Johnson* factors to be considered was "the amount involved and the results obtained." *Hensley, supra*, 461 U.S. at 430 n.3, 103 S.Ct. at 1937.

The importance of this particular factor in the mind of Congress is shown by the fact that the House Committee on the Judiciary chose specifically to highlight the "results obtained" test and four other *Johnson* factors which it considered to be the most critical of the twelve. These were: "the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work, and the amount received in damages, if any." H.R. Rep. No. 94-1558, p. 8 (1976).

Before continuing to discuss the "results obtained" factor, however, it is significant to note that with respect to the other four *Johnson* factors emphasized in the aforementioned House of Representatives report, that the trial court herein apparently ignored those, as well.

There was no evidence before the trial court of either "the customary fee for similar work," or of the customary



fee of respondents' counsel. The case presented no questions which were either novel, or particularly difficult, as evidenced by the fact that respondents prevailed, in addition to their § 1983 claim, only on pendent claims for negligence and false arrest and imprisonment. And, finally, the time records submitted by respondents speak for themselves as to whether the trial court considered the "time and labor required" to achieve a \$33,350 jury award.

Respondents' attorneys' time records reflected that they spent 1,946.75 hours to recover \$33,350, or an effective rate of little more than one attorney hour for every \$17 returned to their clients by the jury. However, the trial judge awarded them attorney's fees of \$125 for every hour they submitted, without any reduction to their total hours. In so doing, the trial court ignored both the language of § 1988, which provides only for a "reasonable" attorney's fee, as well as the direction of this Court, that any such fee-petitioners be required to exercise proper "billing judgment," saying:

The district court should exclude from this initial fee calculation hours that were not "reasonably expended." (citations) Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obliged to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* are not properly billed to one's *adversary* pursuant to statutory authority."

(*Hensley v. Eckerhart*, *supra*, 461 U.S. at 434, 103 S.Ct. at 1939-1940, quoting from *Copeland v. Marshall*, 641 F. 2d 880, 891 (D.C.Cir. 1980) (emphasis in the original))

In the instant matter, respondents' time records, upon which the District Court based its award of attorney's fees (J.A. pp. 44-62, 128-159), disclose the following:

1. Prelitigation time: 208.95 hours, for which respondents were awarded attorney's fees in the sum of \$26,118.75;

2. Travel time (attorney Cazares only, as it is impossible to tell from attorney Lopez' submitted time records how much of his time was spent traveling from his original office in San Diego to court in Los Angeles, or to visit clients in Riverside): 110.05 hours, for which respondents were awarded attorney's fees in the sum of \$13,756.25;

3. Conversations between the two attorneys: 197 hours, for which they were awarded attorney's fees in the sum of \$24,625.00;

4. "Notes for Cazares," apparently being notes made by attorney Lopez for his co-counsel: 45.5 hours, for which respondents were awarded \$5,687.50;

5. Preparation of a Pre-Trial Order (by Mr. Lopez): 143 hours, for which respondents were awarded \$17,875.00;

6. Preparations of Jury Instructions (which were subsequently mostly discarded by the trial court): 59 hours, for which respondents were awarded, \$7,355.00;

7. And, perhaps the most outrageous entry of all—"Stand-by Time"—that is, time spent by Mr. Cazares, who was then based in San Diego, to wait in a Los Angeles hotel room for a jury verdict to be rendered in Los Angeles. During this time, his co-counsel, Mr. Lopez, *was employed in Los Angeles*, at the University of California (U.C.L.A.),



less than 40 minutes' driving time from the federal courthouse. Mr. Lopez submitted no time for "standing-by." Mr. Cazares submitted 45.50 hours for "standing-by" for which respondents were awarded \$5,687.50.

All told, the foregoing represents a total of 836.95 hours, for which respondents were awarded attorney's fees by the District Court at the requested, non-discounted rate of \$125 per hour, for an award *for these items alone*, of \$104,618.75, or more than three times the amount of the judgment herein. As one court faced with like overreaching recently commented:

\* In determining what time is properly excludable, we follow the compelling guideline expressed in the legislative history of § 1988: the statute "may not be subverted into a ruse for producing 'windfalls' for attorneys."

(*Henry v. First National Bank of Clarksdale*, 603 F. Supp. 658, 665 (N.D. Miss. 1984), quoting from *Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983))

Clearly, however, the results of the fee award herein resulted in the kind of windfall to respondents' attorneys which would be difficult, if not impossible, to duplicate in private practice. In reflecting on such a happenstance, the Seventh Circuit noted:

[W]hen a lawyer is working for his own client he sensibly limits his research and preparation in proportion to the magnitude of the results sought by his client and his client's perceived ability and willingness to pay. No such constraints work on a civil rights counsel. Indeed, the temptation is just the opposite. Since "the enemy" will be paying anyway, counsel is induced to read *every* case, depose *every* witness, examine fully *every* tactic, leave *no* stone unturned . . .

(*Bonner v. Coughlin*, 657 F.2d 931, 935, (7th Cir. 1981), quoting from *Scott v. Bradley*, 455 F.Supp. 672, 675 (E.D. Va. 1978) (emphasis in the original))

The Seventh Circuit went on to say:

As this court has recognized, the interest in promoting the redress of civil rights violations by awarding fees under the Act does not include the creation of "a civil rights fee bank to be liberally drawn upon by lawyers for their own welfare"

(*Bonner v. Coughlin*, *supra*, 657 F.2d at 935, quoting from *Coop v. City of South Bend*, 635 F.2d 652, 655 7th Cir. 1980))

The result herein speaks not only to the "temptation" prophesied by the Seventh Circuit, but equally to the abuse of the trial court's discretion in making a fee award which not only was wholly lacking in "billing judgment," but, given the results obtained at trial, one which can hardly be seen as "reasonable," as contemplated by Congress in enacting § 1988.

This is especially so when the award is measured against the "results obtained" factor, mentioned in both *Johnson*, *supra*, and in the aforereferenced House report, and as reflected upon in numerous court decisions. Noting that the "nominal nature of the damages is a factor to be considered in determining the amount of the award," the Seventh Circuit has said:

The amount recovered may sometimes indicate the reasonableness of the time spent to vindicate the right violated.

(*Bonner v. Coughlin*, *supra*, 657 F.2d at 934, quoting from *Scott v. Bradley*, *supra*, 455 F.Supp. at 675)

That is not to say that respondents herein received only a "nominal" amount of damages, as that term is gen-

erally understood. Nevertheless, when measured against their total success, in view of the large number of parties sued and claims made (see "Statement of the Case," *infra*), as well as in terms of real dollar achievement, the results achieved by respondents are indeed nominal, even if the dollars recovered by them are somewhat greater. (It should also be pointed out that of the \$33,350 achieved by the eight respondents, less than half that amount was awarded by the jury for violations of their civil rights. The remainder was for pendent state claims, the lion's share of which was for simple common law negligence. No single civil rights award against any of the six petitioners herein was in excess of \$3,000. No one other than the eight respondents (and their attorneys) benefitted as a result of this case.) This is hardly the kind or degree of success which Congress contemplated as being the basis of a "reasonable" attorney's fee award of nearly a quarter of a million dollars. Such an award is, by definition, unreasonable, and not contemplated by § 1988.

However, petitioners do not mean to imply by the above that significant attorney's fees would be improper in cases involving class actions, injunctive, or some other form of non-monetary relief. Indeed, the congressional intent behind § 1988 is clearly otherwise (see S.Rep. No. 94-1011, p. 6 (1976) ("It is intended that the amount of fees . . . not be reduced because the rights involved may be non-pecuniary in nature."); H.R. Rep. No. 94-1588, p. 9 (1976). But, the within matter is hardly such a case. It was one for monetary relief only. As the Eighth Circuit recently noted in a case in which one of the issues under review was the disproportionality of the fee request (and award) to the results obtained:

We note that this is a private interest case. The result does not benefit anyone other than the plaintiff. Although there are first amendment rights involved which are difficult to evaluate in monetary terms, we note the fee requested is egregiously disproportionate to the settlement obtained. This does not mean that a modest damage award or settlement should dictate the size of the attorney fee, but at the same time, it cannot be ignored. *We cannot help but note that the result achieved is far less than the remedy sought in the plaintiff's complaint.*

(*Jacquette v. Black Hawk County, Iowa*, 710 F.2d 455, 461 (8th Cir. 1984) (emphasis added))

Herein, to the extent that respondents' complaint sought declaratory, injunctive, or other non-pecuniary relief, and to the extent that respondents ever attempted to state claims based on alleged patterns or practices of discrimination, these claims were either dropped prior to trial, or were totally without success at trial.

And yet, the trial court below awarded attorney's fees to respondents as if these claims had not been dropped, and as if the claims on which respondents failed, actually ended in success. Indeed, respondents were awarded attorney's fees at the rate of \$125 per hour on each and every claim on which they did not succeed or pursue, against defendants who were adjudged to have no liability to any of them, and on theories of relief on which respondents did not recover. The "results obtained" by respondents, as a test of the amount of attorney's fees to be properly awarded under § 1988, were ignored by the District Court.

A glaring example of the foregoing is the compensation awarded to respondents as attorney's fees for their vigorously defending motions for summary judgment

brought by 23 of the defendants herein. Respondents' time records disclose that they spent 86.50 hours defending these motions, although they had precious little success in so doing. Seventeen of the 23 movants overcame the strict burden necessary to achieve summary judgment (J.A., pp. 7-13) and were dismissed from the action. Moreover, it is impossible to ascertain from respondents' time records (J.A., pp. 44-62, 128-159) how their time was apportioned among the 23 defendants seeking summary judgment. One thing, however, was clear: respondents achieved far less than total success in defending these motions, while billing more than two weeks' time in so doing.

But this fact never became a matter of inquiry (or, apparently, concern) to the District Court, which simply awarded to respondents as attorney's fees, the sum of \$10,812.50 for defending, unsuccessfully, the motions for summary judgment. This sum represents full compensation to respondents' attorneys for *all* time spent opposing these motions (86.50 hours), at the requested rate of \$125 per hour.

To put it simply: respondents were rewarded for trying mightily to keep in this action persons with respect to whom the original trial judge found, in granting summary judgment, there were no genuine issues of any fact, whatsoever.

Such a result is hardly one which Congress could have countenanced in passing § 1988. Indeed, such a result, like the totality of this fee award (given the nature of this action, and the results achieved thereby), grotesquely deforms the societal need which Congress sought to remedy



by facilitating access to the nation's courts for civil rights litigants. As Justice Rehnquist noted in his order of August 28, 1985, in which he stayed the mandate of the Ninth Circuit herein pending disposition for certiorari:

... it is difficult for me to believe that Congress intended by § 1988 to authorize a prevailing plaintiff to obtain more generous court-ordered attorney's fees from a defendant than the plaintiff's attorney might himself have charged to the plaintiff in the absence of a fee-shifting statute. The billing experience I gained in 16 years of private practice strongly suggests to me that a very reasonable client might seriously question an attorney's bill of \$245,000 for services which had resulted solely in a monetary award of less than \$34,000. In this sense nearly all fees are to a certain extent "contingent," because the time billed for a lawsuit must bear a reasonable relationship not only to the difficulty of the issues involved but to the amount to be gained or lost in the event of success or failure. Nothing in the language of § 1988 or in the legislative history set forth above satisfies me that Congress intended to dispense with this element of billing judgment when a court fixes attorney's fees pursuant to the statute.

(Petitioners' Reply to Brief in Opposition to Petition for Certiorari, Appendix 1, pp. 15-17; *City of Riverside v. Rivera*, — U.S. —, 106 S.Ct. 5, 8-9 (1985))

## **II. The Abuse Of A Trial Court's Discretion In Making An Award Of Attorney's Fees Under § 1988 Is A Proper Ground For Vacating The Judgment**

As this Court recognized in *Hensley, supra*, while a trial court has wide discretion in making an award of attorney's fees under § 1988, that discretion is not wholly unfettered, and must be exercised in light of the guidelines expressed therein.

There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may reduce the award to account for the limited success. The court necessarily has the discretion in making the equitable judgment. This discretion however, must be exercised in light of the considerations we have identified.

(*Hensley v. Eckerhart*, *supra*, 461 U.S. at 436-437, 103 S.Ct. at 1941)

The first of the "guidelines" discussed by this Court following the above quotation was that of "billing judgment." As already pointed out by petitioners, *infra*, respondents neither exercised proper "billing judgment" in their fee submission, nor were they required to do so by the trial court. Neither did the District Court "attempt to identify specific hours that should be eliminated." Rather, the District Court awarded to respondents attorney's fees at the hourly rate they requested, for the amount of time they requested. The trial court made no reductions from their submitted 1,946.75 hours—not even five minutes' worth.

Likewise, the District Court made no attempt to "reduce the award to account for the limited success." Rather, throwing reality to the winds, the District Court merely announced that respondents had achieved "total success" (J.A. p. 236), and that therefore, there was no need to reduce the award to account for the 26 defendants against whom respondents did not prevail, or the many claims fully (and expensively) litigated during the four years preceding trial, and either dropped by the respondents when the trial began, or rejected by the jury during trial.



Further, the District Court made no attempt to separate "hard" (litigation) time from "raw" (or non-litigation time, such as travel or "stand-by" time). On that matter, the Eleventh Circuit recently said:

The district court must determine not just the actual hours expended by counsel, but which of these hours were reasonably expended in litigation. When scrutinizing the actual hours reported, the district court should distinguish "raw" time from "hard" or "billable" time to determine the number of hours reasonably expended.

(*Ramos v. Lamm*, 713 F.2d 546, 553 (11th Cir. 1983))

The Eleventh Circuit added that:

It does not follow that the amount of time *actually* expended is the amount of time *reasonably* expended.

(*Ramos v. Lamm*, *supra*, 713 F.2d at 553 (emphasis in the original))

In the instant matter, for example, attorney Lopez (according to the affidavit contained in his fee request, J.A. p. 31) was a virtual novice when the within litigation began. He submitted a tally of 143 hours for the preparation of a pretrial order and 59 hours for the preparation of jury instructions. For these efforts he was awarded \$25,250 by the District Court (based on 202 hours at \$125 per hour). As the Eleventh Circuit noted:

In the instant case, for example, more than 100 hours were spent drafting the complaint. While this expenditure of time may have been reasonable, it demands an explanation.<sup>3</sup>

3. . . . If the inexperience of counsel requires the unusually large number of hours, the adversary should not be required to pay more than the normal time the task should have required.

(*Ramos v. Lamm*, *supra*, 713 F.2d at 554)

On the matter of awarding travel time at the same rate as litigation time, as was done herein, the Eleventh Circuit said:

However, because there is no need to employ counsel from outside the area in most cases, we do not think travel expenses for such counsel between their offices and the city in which the litigation is conducted should be reimbursed.

(*Ramos v. Lamm, supra*, 713 F.2d at 559)

So, too, did the District Court err in not requiring time records from respondents which would have been sufficient to enable it to properly make an award under § 1988, let alone an award of the magnitude actually made.

Initially, respondents' time records submitted as part of their motion for attorney's fees under § 1988 (J.A. pp. 44-62, 128-159) contained not a word as to how they were prepared, when they were prepared, or what source material was used to prepare them. These things cannot be assumed, and it is respondents' burden to explain such matters. However, despite objection by petitioners, the District Court required no such explanation.

Mr. Lopez' first submission (J.A. pp. 61-65) was nothing more than a tabulation of hours, which described neither the activity, matter, or date on which the time for which he sought to be recompensed was performed. Eventually, both Mr. Lopez and Mr. Cazares filed time records from which it is difficult, if not impossible, to obtain any understanding as to what time was spent by respondents' attorneys on specific claims against specific defendants. Such records make any discussion, or review, of time spent on successful versus unsuccessful claims impossible. As the First Circuit explained in 1984 when it refused to

increase an award of attorney's fees, following a claim made under § 1988:

The affidavit submitted by appellant's attorney, however, did not show how much of the time he spent on prevailing issues. We have repeatedly warned that "we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims.

(*Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir. 1984))

Then, in language which is equally applicable to the situation herein, the First Circuit commented:

The affidavit here was little more than a tally of hours and tasks relative to the case as a whole. Attorneys who anticipate requesting their fees from the court would be well advised to maintain detailed, contemporaneous time records that will enable a later determination of the amount of time spent on particular issues. Cf. *Ramos v. Lamm*, 713 F.2d at 553 (requiring lawyers seeking a fee award under 42 U.S.C. § 1988 to maintain 'meticulous, contemporaneous time records'); *New York Association for Retarded Children v. Carey*, 711 F.2d 1136, 1147-48 (2d Cir. 1983) (announcing 'for the future' that 'contemporaneous time records are a prerequisite for attorney's fees in this circuit'); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (warning that '[a]ttorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records.')

(*Wojtkowski v. Cade*, *supra*, 725 F.2d at 130-131)

The foregoing decisions do nothing more than follow the language of this Court, in *Hensley*, *supra*, wherein it was stated that fee applicants:

... should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.

(*Hensley v. Eckerhart*, *supra*, 461 U.S. at 424, 103 S.Ct. at 1941)

And yet, in spite of all the infirmities in respondents' fee petition, the District Court below awarded to respondents attorney's fees at the requested, non-discounted rate of \$125 per hour for every hour they submitted. Such conduct by the trial court, flying as it does, in the face of all existing authority (not to mention the instructions from this Court that the prior award herein be reconsidered in light of the guidelines set forth in *Hensley*, *supra*, (J.A. p. 184), normally would be without any understanding.

Fortunately, the District Court has provided a key to understanding its conduct herein—conduct that began on the day the jury returned its verdict, and which continued through the remand by this Court of its first award of attorney's fees. In that respect, at least, the conduct of the District Court herein has been remarkably consistent throughout. It was going to do what it wanted to do (i.e., award huge sums of attorney's fees to respondents), regardless of the intent of Congress, regardless of the state of the law, and regardless of the instructions of this very Court.

On October 7, 1980, after the jury verdicts were read and the jury dismissed, and well before any motion for attorney's fees had been made by respondents, the District Court misinterpreted the fee award standard under § 1988 by telling respondents' counsel:

All you have to do is submit to the Court what your hours are.

(J.A., p. 201)

This invitation, and incorrect recitation of the legal standard for the award of attorney's fees, was followed up, a few moments later, with a statement by the trial court which was inexplicable, given the existing law regarding § 1988 fee awards, and especially since no motion for fees was then pending:

My disposition now, so you will be aware of it, is that I would give Mr. Cazares the attorney's fees that cover *everything he did that's legitimate* so that the burden of the attorney's fees does not fall on the parties . . . And the final thing I say is that I have no quarrel with the quality of what he did. *So if I have no quarrel with the quality and he gives me the hours, I will compensate them. And you will have to tell me the rate.*

(J.A., p. 203) (emphasis added)

The District Court was to make good on its word, and even after remand herein, it remained unphased by higher authority, saying at the hearing on the spreading of the mandate from the Ninth Circuit following the vacating of its fee award by this Court:

[t]he United States Supreme Court is not saying, in sending the matter back, and the Ninth Circuit is not saying, in sending the matter back, that the award is wrong or not supported. It merely wants the Court to give it some more findings.

(J.A., p. 225)

In other words, if the United States Supreme Court wanted "some more findings," more findings it was going to get, including those which could find no support from the record. There was to be no ". . . further consideration in light of *Hensley v. Eckerhart* . . ." (J.A., p. 184, *City of Riverside v. Rivera, supra*, 461 U.S. 952, 103 S.Ct. 2421), in spite of this Court's order to that effect.



Indeed, the District Court was quite straightforward regarding its lack of intention of reviewing the record to enable it to make a "further consideration." It had already made up its mind, saying *at the time of the spreading of the mandate*:

I tell you now that I will not change the award. I will simply go back and be more specific about it.

(J.A., p. 230)

With these words, the District Court made the previous remand by this Court nothing more than an academic exercise. No authority, judicial or otherwise, was going to sway the trial court from its previous award of attorney's fees.

And, that is exactly what transpired. No sums of attorney's fees were changed in any amount. There were to be no further affidavits explaining the proper rate of remuneration for attorneys handling cases of this type in southern California. There was to be no explanation of how the respondents' attorneys prepared their time records, when, or from what source documents. There was to be nothing explaining what time was spent on which claim against which defendants.

All that happened, *as the District Court had previously announced it would*, was that new findings were tailored to fit an old result.

In the process, the District Court abused its discretion by failing to follow the dictates of this Court in *Hensley, supra*, and, thereafter, by awarding to respondents attorney's fees which were on their face unreasonable. As such, the District Court abused its discretion, as well, by ignoring the intent of Congress and the language of § 1988. As the Ninth Circuit itself said long ago:

Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only when no reasonable man would take the view adopted by the trial court.

(*Delno v. Market St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942))

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### CONCLUSION

As a result of decisions, such as that by the District Court herein, misinterpreting and/or misapplying the clear intent of Congress in enacting § 1988, an apparent growth industry has arisen among plaintiffs' lawyers across the country. Easily yielding to the "temptation" about which the Seventh Circuit was concerned in *Bonner v. Coughlin*, *supra*, 657 F.2d at 935, lawsuits of marginal worth are being filed so as to achieve the magical goal of "prevailing party" status under § 1988, and, thus, to open to these attorneys the coffers of defendant municipalities, states, and other governmental agencies.

Since all that is needed to achieve "prevailing party" status under § 1988 is success on one claim against one defendant, regardless of the number of claims sued upon or defendants litigated against, the burden of so doing isn't particularly difficult, nor is the attorney's risk of not being compensated therefor particularly great. Owing to the largess of many district courts, the goal of achieving huge awards of attorney's fees appears, not infrequently, to have subsumed the goal anticipated by Congress in the passage of § 1988, to wit: to provide a vehicle whereby civil rights litigants would be provided with court access



through the payment of attorney's fees "adequate to attract competent counsel," yet not so large as to "provide windfalls to attorneys." S.Rep. No. 94-1011, p. 6 (1976); see also H.R. Rep. No. 94-1558, p. 9 (1976).

As the Eighth Circuit reflected in approving the reduction of an attorney's fees request:

The Attorney's Fees Awards Act should not serve as a vehicle to charge exorbitant fees and such excessive fees should not act to chill good faith defenses to claims brought under the Civil Rights Act.

(*Jacquette v. Black Hawk County, Iowa, supra*, 710 F. 2d at 463)

But the result which the Eighth Circuit feared, has apparently come to pass. Cases are worked, churned, and litigated to achieve marginal success, at least from the standpoint of the plaintiff-client, with the full knowledge that riches, in the guise of "reasonable" attorney's fees, may be achieved thereby. Herein, respondents filed numerous claims against numerous defendants, prevailed on a very few of the claims, against a very few of the defendants, and, yet their attorneys were compensated for all time expended thereon. They were compensated for time spent litigating against defendants who had no liability to their clients. They were compensated for litigating theories they voluntarily abandoned at trial, after having spent enormous amounts of time on these theories for the previous four years. They were compensated for litigating theories which the jury found were without merit. And, as pointed out *infra*, they were compensated for defending against, and losing summary judgment motions brought by innocent parties who should never have been sued in the first place. They were even compensated for "standing-

by” in a hotel room, when co-counsel was less than three-quarter of an hour’s drive from court. Here, as elsewhere, § 1988 had become the golden goose, and an end unto itself, rather than, as anticipated by Congress, a means to an end.

Apparently, for respondents, no claim was too tenuous not to pursue, nor was any defendant so potentially lacking in culpability, that fully litigating against such defendant was not the order of the day. Every minute of time that could conceivably be expended on this case, was so expended. After all, if successful as “prevailing parties,” respondents bore none of the risk of having to pay for such overzealous lawyering, at least under the interpretation of § 1988 then prevalent in the Ninth Circuit.

Interestingly enough, the First Circuit has recently taken a different view; one that seems more in tune with the congressional intent of § 1988, and where, as here, involved a case in which fee petitioners were operating under the assumption that “the standard of service to be rendered and compensated is one of perfection, the best that illimitable expenditure of time can achieve.” *Grendel’s Den, Inc. v. Larkin*, 749 F.2d 945, 953 (1st Cir. 1984) Therein, the First Circuit correctly noted:

[J]ust as a criminal defendant is entitled to a fair trial and not a perfect one, a litigant is entitled to attorney’s fees under 42 U.S.C. § 1988 for an effective and completely competitive representation but not one of supererogation.

(*Grendel’s Den, Inc. v. Larkin*, *supra*, 749 F.2d at 953-954)

Not stated, either by the District Court in making its twin awards of attorney’s fees herein, nor by the Ninth Circuit, in affirming same, is that no private client would

possibly accept an attorney's bill of \$245,000 for achieving only \$33,350 as being one that was "reasonable." That the District Court herein should have done otherwise only shows how far from the intent of Congress the trial court has strayed. It also shows why the award of attorney's fees herein should not only be vacated and remanded, but that this time, the remand be accompanied by specific instructions to *actually* engage in a reconsideration of the fee award herein consistent not only with this Court's decision in *Hensley v. Eckerhart*, *supra*, but with the intent of Congress, as well.

Respectfully submitted,

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Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.

CLERK

In The  
**Supreme Court of the United States**  
October Term, 1985

— 0 —  
CITY OF RIVERSIDE, et al.,  
*Petitioners,*  
vs.

SANTOS RIVERA, et al.

— 0 —  
On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

— 0 —  
**BRIEF FOR RESPONDENTS**

— 0 —  
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**QUESTION PRESENTED**

Whether the District Court and the Court of Appeals correctly found — under the Civil Rights Attorney's Fees Awards Act of 1976 and this Court's decision in *Hensley v. Eckerhart* — that respondents' counsel were entitled to fees for all time reasonably expended on this case.

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In The  
**Supreme Court of the United States**  
October Term, 1985

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CITY OF RIVERSIDE, et al.,  
*Petitioners,*  
vs.

SANTOS RIVERA, et al.

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On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

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**BRIEF FOR RESPONDENTS**

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**STATEMENT OF THE CASE**  
**I. INTRODUCTION**

This case concerns the reasonableness of an award of fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, to Gerald P. Lopez, who is now a Professor of Law at Stanford Law School,<sup>1</sup> and to Roy B.

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<sup>1</sup> Professor Lopez graduated from Harvard Law School in 1974. After clerking in the federal district court, he started his own law practice in San Diego along with Roy B. Cazares and two other attorneys, specializing in civil rights litigation and the representation of low-income clients. He has taught courses on civil rights litigation, contracts, and other subjects at UCLA and Harvard Law Schools as well as Stanford.

Cazares, who is now a Judge of the San Diego Municipal Court.<sup>2</sup> The judgment awarding fees was initially entered in April 1981 by District Judge Mariana R. Pfaelzer,<sup>3</sup> for services performed by Lopez and Cazares between August 1975 and November 1980 in representing the prevailing plaintiffs (respondents in this Court) in the civil rights action described below. Neither Lopez nor Cazares has yet received any fees for work on the case.

Judge Pfaelzer found that, over the five year period culminating in a nine day jury trial in September 1980, Lopez and Cazares worked a total of 1,946.75 hours on the

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<sup>2</sup> Judge Cazares graduated from Harvard Law School in 1973. After working as a trial attorney in the Defenders' Program of San Diego County for two years, he started his own law practice along with Gerald P. Lopez and two other attorneys. He specialized in civil rights, criminal defense and labor litigation, primarily on behalf of low-income clients.

<sup>3</sup> Prior to her appointment to the federal bench, Judge Pfaelzer practiced law for 20 years with the Los Angeles firm of Wyman, Bautzer, Rothman & Kuchel, where she specialized in business litigation on behalf of such clients as the American Broadcasting Company, American Telephone and Telegraph, Paramount, and Metro-Goldwyn-Mayer. 2 *Los Angeles Daily Journal Judicial Profiles* (unpaginated and undated); *Los Angeles Daily Journal*, Sept. 9, 1980, at 1, col. 3. Judge Pfaelzer was a senior partner with Wyman, Bautzer from 1969 to 1978; she was first nominated to the federal bench in 1975, but declined that nomination due to the recent deaths of two partners in her law firm. 2 *Los Angeles Daily Journal Judicial Profiles*. From 1974 to 1978, she also served as a member of the Los Angeles Police Commission, which is not a civilian review board, but a city agency responsible for the operation and supervision of the Los Angeles Police Department. *Id.* In 1978, Judge Pfaelzer was the president of the Police Commission. *Id.* See also Bicentennial Committee of the Judicial Conference of the United States, *Judges of the United States* 390 (2d ed. 1983).



case. (J.A. 174, 189).<sup>4</sup> Judge Pfaelzer further found that \$125 per hour was the prevailing market rate for similar services in the Central District of California. (J.A. 174, 190). Judge Pfaelzer found no facts that would justify a failure to compensate respondents' counsel for the full value of the services they performed in the case. (J.A. 174, 187-90). Petitioners and amici, including the Solicitor General,<sup>5</sup> do not challenge these findings of fact as clearly erroneous. See Rule 52(a), Fed. R. Civ. P. Rather,

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<sup>4</sup> "J.A." refers to the joint appendix filed in this Court. Other abbreviations used in this brief are as follows: "P.Br." refers to the brief for petitioners; "S.G.Br." refers to the brief *amicus curiae* filed by the Solicitor General of the United States; "Bliley Br." refers to the brief *amicus curiae* filed by Congressman Thomas J. Bliley, Jr., et al; "EEAC Br." refers to the brief *amicus curiae* filed by the Equal Employment Advisory Council.

<sup>5</sup> The views expressed in the brief filed by the Solicitor General are contrary to the views of the United States Equal Employment Opportunity Commission. The Commission, which has been granted the lead role among federal agencies in enforcing Title VII and other employment discrimination statutes (see Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1970), 92 Stat. 3781; Executive Order No. 12067, 3 C.F.R. 206 (1978)), reviewed the present case and unanimously concluded that "a rule restricting the award of attorney's fees solely because the dollar amount of damages is low could result in less than full relief for identified individual victims of discrimination who successfully bring suit . . . [and] would also discourage private attorneys from taking Title VII cases which involve only individual claims." *EEOC Memorandum to Solicitor General Charles Fried* at 1 (Nov. 18, 1985), published in *BNA Daily Labor Report*, Jan. 9, 1986, at E-1. The Solicitor General rejected the Commission's recommendation that he file a brief supporting affirmance and instead filed a brief urging reversal of the judgment below and imposition of a proportionality requirement. See *BNA Daily Labor Report*, "Justice Department Rejects EEOC Advice, Seeks Limit on Lawyer Fees in Rights Cases," Jan. 9, 1986, at A-1. Cf. *Williams v. City of New Orleans*, 729 F.2d 1554, 1572 n.5 (5th Cir. 1984) (en banc) (Wisdom, J., concurring in part and dissenting in part). Respondents have been advised that the Commission's Memorandum to the Solicitor General is being reproduced as an appendix to the brief *amicus curiae* of the NAACP Legal Defense and Educational Fund, Inc.

they contend that the award was not "reasonable" within the meaning of § 1988 and that Judge Pfaelzer abused her discretion because, in their view, the award was not sufficiently proportional to the monetary damages obtained by respondents. See, e.g., P.Br. at 5-8.

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## II. STATEMENT OF FACTS

Judge Pfaelzer's award of fees was informed by, and should be reviewed with, an understanding of the underlying facts in this case, including the facts presented at the trial over which she presided. See *Anderson v. City of Bessemer City*, 105 S. Ct. 1504 (1985). Those facts are summarized below.<sup>6</sup>

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<sup>6</sup> The testimony that was presented at the trial of this case has never been transcribed. Defendants did not appeal the underlying judgments for plaintiffs on the merits, but challenged only the award of attorney's fees to plaintiffs' counsel. Defendants did not, to our knowledge, request a trial transcript for the purposes of their appeal. To avoid incurring unnecessary expense and transforming the fee request into "a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), plaintiffs likewise did not request a trial transcript. Accordingly, the facts set forth in this brief, unless otherwise identified, are based on documents in the joint appendix ("J.A.") or in the record before the District Court. The latter documents are identified in this brief as follows: depositions ("Dep. of") are identified by the name of the deponent, page numbers and date; police reports ("Police R."), obtained from defendants through discovery requests, are identified by the name of the author and the title of the document; written reports of police radio recordings ("Radio R.") and cassette tapes of police radio recordings ("C.T. Radio R."), also obtained from defendants through discovery requests, are identified by time and speaker.

### **A. The Events of August 1, 1975**

On the evening of August 1, 1975, Santos and Jennie Rivera gave a party at their home on Lincoln Avenue in Riverside, California.<sup>7</sup> Before that night, no one in the Rivera family had ever been arrested. The Riveras and their approximately fifty guests had no warning that evening of possible trouble; "[t]he party was not creating a disturbance in the community. . . ." (Findings of Fact and Conclusions of Law, J.A. 188).

On that same evening, Riverside police officers Linford Richardson and Gerald Miller were involved in an investigation geographically near, but unrelated to, the party at the Rivera home. At 11:18 PM Richardson broadcast over his car radio that he and Miller were then chasing two juvenile pedestrians suspected of having discarded a paper cup partially filled with beer. (See "Radio Recordings of August 1 Incident" ("Radio R.");<sup>8</sup> Richardson's Police Report ("Police R.")). At

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<sup>7</sup> Plaintiffs Santos and Jennie Rivera lived at the Lincoln Avenue residence with their 11-year old son, plaintiff Donald Rivera. Plaintiffs Jerome Rivera, Lee Roy Rivera, and 13-year old Mark Larabee (who at the time of the party was visiting from his family home in Arizona) are nephews of Santos and Jennie Rivera. Plaintiffs Enrique Flores and Manuel Flores, Jr. are brothers-in-law of Jerome Rivera and friends of Santos and Jennie Rivera.

<sup>8</sup> "Radio Recordings of August 1 Incident" is a written report dated November 13, 1975, and prepared by two officers of the Riverside Police Department for the use of Deputy District Attorney Edward Daniel Webster in the criminal prosecution of plaintiffs and other guests at the Rivera home. This report does not purport to be a verbatim transcript of the recorded radio traffic relevant to the events at the Rivera home on August 1, but rather "reflects the meaning of conversations" actually recorded on cassette tapes which were also delivered to Webster. (Radio R.).

11:19 Richardson radioed that, while chasing one of the minors on foot, he noticed what he described as a "fairly large party." (Radio R.). Although he reported that he expected no problem at the scene of the chase, he nevertheless directed backup units to "go by the party," and to "make sure all your equipment is with you. Helmets and sticks."<sup>9</sup>

A surveillance helicopter and backup units soon arrived.<sup>10</sup> Though Richardson and Miller were then almost a block west of the Rivera home, one police unit parked directly in front of the Rivera residence. The officers in this unit, defendant Peters and another officer, got out of the unit, drew their weapons and started waving them toward the Rivera residence. (Dep. of Lee Roy Rivera at 5 (Dec. 16, 1976)).

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<sup>9</sup> The quotation of defendant Richardson's broadcast in the text is taken from the police cassette tapes ("C.T. Radio R."). By contrast, the written report of the radio recording states only that defendant Richardson "directs that the back-ups continue to respond." (Radio R.).

<sup>10</sup> At about this time, plaintiff Jennie Rivera called the police station to ask why a police helicopter was hovering over her home and shining its lights into her yard. Told that officers were chasing two minors, she informed the police dispatcher that the only two minors at the party, her son and nephew, were both asleep. (See Deposition of ("Dep. of") Jennie Rivera at 13, 17 (Dec. 16, 1976)). The dispatcher so advised defendant Richardson, who was asked if he wanted to speak to the woman. He radioed: "Negative. We don't have anything to say to those people . . . I don't see where we have anything to tell the lady. If they don't keep the kids from drinking and keep them off the street, there's gonna be trouble." (C.T. Radio R.). In fact, the fleeing minors had not been at the party, nor did they hide there when chased by defendants Miller and Richardson. (See Dep. of Jerome Rivera at 5, 19 (Dec. 16, 1976); Dep. of Lee Roy Rivera at 17 (Dec. 16, 1976)).

Meanwhile, a second unrelated incident was developing nearly a block west of the Rivera home. In the course of defendant Richardson's struggle with two persons just cited for having an open container of beer in a pickup truck, defendant Miller radioed an "1199" ("Officer needs help!"), a radio call which by convention immediately leads to, and in this instance in fact resulted in, a massive police response. Some units responding to Miller's call, however, went not to Richardson's and Miller's location but to the Rivera home, where Peters and his partner were standing outside their unit waving their weapons.

The commotion and fear generated by the police helicopter's searchlight surveillance, the numerous police units now arriving all along Lincoln Avenue, and particularly the two officers brandishing their weapons directly in front of the Rivera home prompted plaintiff Jerome Rivera and a friend to leave the party and to approach the police officers to ask whether they could help in any way. (See Dep. of Jerome Rivera at 6-7 (Dec. 16, 1976)). However, when Rivera walked up to defendant Miller and offered to help, Miller responded with belligerent vulgarities. (*Id.* at 7). Rivera then asked Miller for his name and badge number, which Miller refused to provide. (*Id.* at 8). When Rivera leaned over to look at Miller's badge number, Miller poked Rivera with his nightstick. Rivera then backed up and turned around to walk back to the party, at which point defendant Plait hit Rivera on the back of the head with a nightstick, lacerating his scalp. (*Id.* at 8-9).

The situation rapidly deteriorated as units, sirens screaming and red lights flashing, continued to converge



without supervision or instructions. According to the defendants, both those police officers who then were arriving in response to the "1199" and those already on the scene were being subjected to an unrelenting "barrage" of dirt clods, rocks, bottles, cans and sticks. (See, e.g., Watts' Supp. Police R. at 1). However, no officer (except for Richardson) ever claimed that he had been struck by a projectile. Moreover, the police did not gather a single projectile as evidence, even though later they charged some of the plaintiffs with assault with a deadly weapon. (See, e.g., Dep. of M. Watts at 15 (Jan. 12, 1977)).

Finally, the only witness who was not directly involved in the police action on Lincoln Avenue that evening, John Hocking, offered an account in conflict with the police officers' story. Mr. Hocking then lived at 7003 Lincoln Avenue and, among other holdings in the City of Riverside, owned the orange groves that surrounded the Rivera residence. Drawn outside by the arrival of the police units, Mr. Hocking witnessed what happened from the time of the "1199" call to the final departure of the police hours later. Mr. Hocking saw no crowd from the Rivera home threatening police officers; he saw not a single item thrown; and he saw no one attempt to strike a police officer. What Mr. Hocking did see on the night of August 1 was undisciplined violence by police officers against civilians: police officers beating two Chicano youths and kicking an elderly Mexican-American woman in the stomach.<sup>11</sup>

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<sup>11</sup> Concerned by police reports that crowds had invaded his orange groves, Mr. Hocking went at dawn on August 2 to in-

Guests standing in the driveway watching a bleeding Jerome Rivera walk back to the house were ordered by defendant Peters either to get back into the house or to leave. (Dep. of Lee Roy Rivera at 9-11 (Dec. 16, 1976)). Some guests, attempting to comply with the order by leaving, were seized, struck, choked, arrested, searched, subjected to ethnic slurs and maced. (*Id.* at 10, 14, 21). Other guests returned to the house, only to have defendant Watts, who commanded the operation at the Rivera residence, throw tear gas grenades at and into the home. (Dep. of Jennie Rivera at 6, 16 (Dec. 16, 1976)).

Once they were forced outside by the tear gas and police, the Riveras and their guests were made to run a gauntlet of Riverside police officers who, without provocation, prodded, shoved and beat them with nightsticks, and then handcuffed them and dragged them across the street. (*Id.* at 10). With the help of other police officers, defendant Miller then used a grease pencil to write the number "409" in large script on the foreheads of those arrested. (Watts' Supp. Police R. at 2). "409" is the California Penal Code number for the charge of failing to disperse. As they were paraded before their neighbors, handcuffed and humiliated, plaintiffs and other guests could hear defendant Olsen singing over the police helicopter's broadcast system, "The party's over. It's time to call it a day." (Dep. of J. Olsen at 41 (Aug. 29, 1978)).

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(Continued from previous page)

spect his irrigation system for damage. He found no damage and not even any footprints in his recently irrigated grove. He also inspected the asphalt roadway between the Rivera home and his own for any trace of the projectiles supposedly thrown at the officers the night before. He found none.



## B. The Cover-Up

Riverside police officers and city officials immediately began to cover up the police violence and misconduct that had taken place at the Rivera home. In the early morning hours of August 2, defendants and other Riverside police officers met at the police station to collaborate in the drafting of false, evasive and incomplete police reports.<sup>12</sup> In his supplementary report of August 2, for example, defendant Peters reported that he drew and waved his weapon only "after observing that the subjects had already assaulted Uniformed Police Officers." (Peters' Supplementary Police R. at 1). At trial Peters admitted that this report was false.<sup>13</sup>

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<sup>12</sup> Defendant Richardson maintained that the report writing system used by the City of Riverside "eliminated conflicting statements that tend to enter into reports when being independently written, by forcing the officers involved to corroborate [sic] in preparing a single report." (Richardson's Shift Activity Report at 3).

<sup>13</sup> As noted above, there is no trial transcript in this case. However, the exchange in which Peters made this admission was reported in *The Press*, a Riverside newspaper covering the civil rights trial:

"Peters testified that he had not actually 'observed subjects already assaulting (a) uniformed police officer' as he wrote he had in an arrest report.

" 'This is a flat lie in your report, isn't it?' said plaintiffs' attorney Roy B. Cazares, of San Diego.

" 'No, it is not,' said Peters. He said, based on past 'personal experience' in Casa Blanca and police problems there, he 'assumed' an attack on then Sgt. Linford Richardson had occurred after he saw a dozen people coming toward him from what he thought was Richardson's location.

"Judge Pfaelzer asked Peters if he had seen an assault on Richardson.

" 'I did not see the uniformed officer,' he said.

" 'That is not the question,' said the judge.

" 'No,' answered Peters. . . ." *The Press*, Sept. 24, 1980, § B, at 3.

On August 3 a police investigating officer, who had been assigned the task of deciding whether to ask the District Attorney to bring charges against those arrested at the party, read police reports, spoke to some arresting officers, and asked defendants Watts and Richardson to prepare supplemental reports. (See Dep. of M. Smith at 7-8, 10-11 (Dec. 12, 1978)). Without further investigation, he requested on behalf of the City that the District Attorney file particular charges against those arrested. (*Id.* at 14).

On August 4, before an internal investigation of the incident had been completed, the Chief of Police reported to the City Manager and City Council, praising the quality of police work in the mass arrests at the Rivera home. (See Ferguson Report to Daniel E. Stone, City Manager, on Police Activity Lincoln and Mary ("Ferguson R.")). For this report, the Police Chief did not interview the Riveras, John Hocking, or any other civilians about what they had experienced or seen, but relied exclusively on police officers' accounts.

The Deputy District Attorney whose job it was to file criminal complaints apparently recognized that the police reports failed to support either the arrests made or the charges recommended by the investigating officer. (See Dep. of M. Smith at 14; Dep. of D. Innskeep at 6-7 (Dec. 12, 1978)). The investigating officer, however, continued to urge that criminal complaints be filed (see Dep. of M. Smith at 12 (Dec. 12, 1978); Dep. of E. Webster at 6 (Dec. 12, 1978)), although he later admitted that at these early meetings he may have opposed dismissals of the charges out of concern for the City's potential civil liability. (See Dep. of M. Smith at 17 (Dec. 12, 1978)).

In response to pressure from the Chicano community following the events at the Rivera home, the City established a 15 member committee to investigate the tensions between the people of Casa Blanca, the Chicano barrio near the Riveras' home, and the Riverside Police Department. (See Final Report to City Council by Ad Hoc Committee on Casa Blanca ("Final Report") (Feb. 9, 1976)). Five months and 19 public meetings later, the committee issued a majority report confirming what Chicanos in Riverside had long known: that they were often treated unfairly and with hostility in their hometown, while city officials and employees consistently pursued and defended anti-Chicano policies and customs. (*Id.* at 83-85). The report acknowledged the historical mistreatment of Chicanos by Riverside police officers, and it urged considerable changes in the structure of the police department and in the hiring, training and supervision of the police officers who regularly worked in Chicano neighborhoods. (*Id.* at 1-26). The City Council, after receiving the committee's report, nevertheless chose to affirm its existing policies and customs.

The official cover-up continued with the prosecution of those plaintiffs who had been charged with criminal offenses.<sup>14</sup> In October 1975, shortly before the criminal trial of the plaintiffs was set to begin, the Deputy District Attorney conducted a reenactment of the events at the

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<sup>14</sup> After the August 1 incident, police officers also harassed some plaintiffs. For example, Jennie Rivera received threatening phone calls, was subjected to helicopter surveillance over her home, and saw police officers staking out her home, "flipping off" (extending the middle finger of the hand to) her son, and "sticking out their tongues like babies" as they left. (See, e.g., Dep. of Jennie Rivera at 24-26 (Dec. 16, 1976)).

Rivera home with defendants and other officers (see Dep. of E. Webster at 6, 7, 12, 18, 19, 22 (Dec. 12, 1978)), and, as a result, concluded that the police reports describing crimes allegedly committed by Jerome and Lee Roy Rivera could not be correct. (*Id.* at 19, 20).

But to protect the City and individual defendants from civil liability, the Deputy District Attorney invoked a city policy established for these circumstances. (Dep. of D. Innskeep at 13, 16 (Dec. 12, 1978)). He offered to dismiss the criminal complaints in exchange for Jerome and Lee Roy Riveras' stipulation that there was probable cause for their arrest. (Dep. of E. Webster at 15 (Dec. 12, 1978)). Advised by their attorneys that admitting to probable cause would damn later efforts to hold defendants responsible for unconstitutional acts and policies, Jerome and Lee Roy Rivera refused the offer and prepared to be tried. Inevitably, however, the illegitimacy of the prosecution led to dismissal of these two cases as well as those of the other plaintiffs arrested at the party. (See J.A. 188).

### **C. Litigating the Case**

In this environment of official concealment and hostility, plaintiffs had great difficulty finding an attorney who would take action against the City. For weeks plaintiffs searched for a local attorney who would represent a politically unpopular position, on behalf of people without the money to finance major litigation,<sup>15</sup> in a case that

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<sup>15</sup> The occupations of the adult plaintiffs were custodian, sales clerk, gas station operator, correctional officer, accountant, and custodian/student. Two others were youngsters 11 and 13 years old.

was obviously complicated, likely to be lengthy and unlikely to succeed. Finally, through their U.S. Representative's office, they were referred to Roy Cazares and Gerald Lopez, who were then attorneys in a small, newly formed law firm in San Diego, some 120 minutes by car and 100 miles southwest of Riverside. On August 21, 1975, Cazares and an investigator drove to Riverside to interview the Riveras and other witnesses to the events of August 1. (See J.A. 44).

Cazares and Lopez eventually agreed to represent the Riveras, even though they knew that the case would be time-consuming and difficult, and that the outcome was uncertain. Details of the continuing official misconduct were sketchy, confused and almost exclusively within the knowledge of police officers and other city officials who were covering up the wrongdoing. Defendants had every reason to withhold this information from plaintiffs, who could not even tell their attorneys which police officers were responsible for what actions; tear gas and police gas masks made identification of many individual officers impossible.

Like the facts, existing law governing the § 1983 lawsuit was murky. In those days before *Monell v. Department of Social Services*, 436 U.S. 658 (1978), civil rights counsel had to rely on alternative theories of liability to avoid the Court's mistaken ban on § 1983 claims against local governments. See *Monroe v. Pape*, 365 U.S. 167 (1961). Pursuing § 1983 claims against individual police officers presented equally complex and unsettled legal issues: What was the requisite state of mind to establish a cause of action? How was the causation language of

§ 1983 to be interpreted, particularly in claims against supervising officials? These factual and legal problems were exacerbated by the distance between San Diego and Riverside, which made communication and investigation even more difficult and time-consuming. (J.A. 41). And, as described above, defendants and other city officials persisted in their efforts to conceal their constitutional wrongdoing.

Despite investigative efforts that had begun in August 1975 and stretched through May 1976, details of the events of August 1 and their aftermath remained unknown and unlearnable. Under these circumstances, plaintiffs filed an action in federal district court<sup>16</sup> on June 4, 1976, stating civil rights and pendent state tort claims against the City of Riverside, the Chief of Police and 30 individual police officers.<sup>17</sup> The District Court found that the factual

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<sup>16</sup> The case was initially assigned to District Judge Warren J. Ferguson, but in November 1978 was transferred to District Judge Pfaelzer, who has presided over all subsequent proceedings in the District Court, including the trial on the merits and all attorney's fee litigation.

<sup>17</sup> Petitioners incorrectly assert that plaintiffs brought 256 claims against them. (See P.Br. at 3). The complaint filed in June 1976 stated seven causes of action, encompassing claims alleged under 42 U.S.C. §§ 1981, 1983, 1985 and 1986 and for false arrest/imprisonment, malicious prosecution and negligence. See Ninth Circuit Excerpts of Record at 12-25. By September 1980, when the case was tried, changes in § 1983 law had rendered the civil rights claims grounded in §§ 1981, 1985 and 1986, as well as the state claim for malicious prosecution, substantially replicative of the § 1983 claims. Plaintiffs therefore abandoned these claims before trial. Only the § 1983 and state pendent claims for false arrest/imprisonment and negligence ultimately were tried to the jury, although the underlying substantive claims asserted through § 1983 included Fourteenth, Fourth and Fifth Amendment deprivations.



and legal uncertainties and complexities made it "reasonable for plaintiffs initially to name thirty-one individual[s] . . . as well as the City of Riverside as defendants in this action." even though claims against 17 individual officers were later dismissed on motions for summary judgment. (J.A. 188).<sup>18</sup>

After four years of discovery and two settlement conferences,<sup>19</sup> a nine day trial ensued on the § 1983 (Fourteenth, Fourth and Fifth Amendment) claims<sup>20</sup> and the

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<sup>18</sup> Those police officers who were dismissed from the suit on motions for summary judgment filed a malicious prosecution complaint in the Riverside Superior Court against both the plaintiffs and their attorneys. This suit resulted in a series of related proceedings, including an appeal of the suit's dismissal to the Ninth Circuit, and it remained alive until the District Court denied defendants' request for attorney's fees under § 1988 on the ground that plaintiffs' claims against those defendants were not vexatious, frivolous, or brought to harass or embarrass the defendants. (See J.A. 186; *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)).

<sup>19</sup> Judge Pfaelzer ordered and personally presided over both conferences. After being urged by the District Court to reconsider the substantial risk of liability at trial, defendants' counsel made a final offer of \$10,000 in satisfaction of all plaintiffs' claims, attorney's fees and costs. (J.A. 188, 226-27).

<sup>20</sup> In his in chambers opinion, Justice Rehnquist incorrectly reports that, prior to trial, plaintiffs dropped their original allegations that the police officers had acted with discriminatory intent. (See *City of Riverside v. Rivera*, 106 S. Ct. 5, 6 (1985); see also P.Br. at 3). In fact, plaintiffs never dropped their claim that defendants had violated their equal protection rights under the Fourteenth Amendment, a claim that requires proof of discriminatory intent under *Washington v. Davis*, 426 U.S. 229 (1976). The jury's § 1983 verdicts in favor of all plaintiffs and against the city and individual defendants encompassed this underlying equal protection claim. Moreover, the District Court's Findings of Fact and Conclusions of Law describe defendants' unconstitutional acts as intentional and "motivated by a general hostility to the Chicano community. . ." (J.A. 189-90).



state pendent claims. The jury, after seven days of deliberation, found in favor of all eight plaintiffs and against the City of Riverside and five individual officers on § 1983 claims for Fourteenth, Fourth and Fifth Amendment deprivations, and on state claims for negligence and false arrest/imprisonment. The jury awarded total damages of \$33,350.<sup>21</sup>

#### **D. Litigating the Fees**

On December 1, 1980, plaintiffs moved for reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988. In April 1981, the District Court awarded plaintiffs \$245,456.25 in attorney's fees on the basis of written Findings of Fact and Conclusions of Law. (J.A. 171-75). In making this award, the District Court refused to apply the multiplier requested by plaintiffs, and it reduced plaintiffs' request by those costs it found to be beyond the intended scope of § 1988.

Defendants appealed, and the Ninth Circuit affirmed the District Court's award as reasonable. *Rivera v. City*

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<sup>21</sup> Justice Rehnquist's in chambers opinion (106 S. Ct. at 6) and petitioners' brief (P.Br. at 3, 16) erroneously state that plaintiffs dropped their requests for injunctive and declaratory relief prior to trial. They did not; in fact, it was impossible for plaintiffs to determine whether to pursue such relief until after trial. (See Ninth Circuit Excerpts of Record at 122; J.A. 214, 219). After trial, plaintiffs' counsel advised the District Court that they had decided not to pursue such relief because enjoining defendants to "obey the law . . . including the Constitution" seemed too broad and imprudent. Cf. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). The District Court nonetheless observed that, "if you [plaintiffs] had asked for it against some of the officers I think I would have granted it. . . . I would agree with you that there is a problem about telling the officers that they have to obey the law. But if you want to know what the Court thought about some of the behavior, it was — it would have warranted an injunction." (J.A. 219).

of *Riverside*, 679 F.2d 795 (9th Cir. 1982) (J.A. 176-83). Defendants filed their first petition for certiorari in January 1983. In May 1983, this Court granted the writ and remanded this case and every similar case on its docket for reconsideration in light of its recent decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). See 461 U.S. at 951-52 (1983).

Plaintiffs' request for reasonable attorney's fees and costs was then reconsidered by District Judge Pfaelzer over a period of 12 months, during which two hearings were held. (J.A. 224, 232-42). On July 26, 1984, Judge Pfaelzer issued comprehensive Findings of Fact and Conclusions of Law, awarding attorney's fees in the amount of \$245,456.25, (J.A. 187-92), but again refusing to apply the multiplier requested and reducing the award by those costs that she found to be not contemplated by the statute. Judge Pfaelzer subsequently denied plaintiffs' motion requesting an increase in the appeal bond posted by defendants. (See Reporter's Transcript of Proceedings, at 4 (Nov. 16, 1984)).

Defendants appealed once again, and the Court of Appeals concluded that the District Court had carefully examined the record and had correctly applied the *Hensley* criteria in determining a reasonable fee in this case. (J.A. 197). The Ninth Circuit denied, but Justice Rehnquist subsequently granted, a stay of the Ninth Circuit's mandate pending disposition of the present petition for certiorari, which this Court granted on October 21, 1985.

## SUMMARY OF ARGUMENT

Petitioners and amici urge the Court to substitute mechanical proportionality for *Hensley's* contextualized approach to the award of fees under § 1988. They would have the Court believe that excessive civil rights litigation under § 1983, encouraged by exorbitant fee awards under § 1988 to rapacious plaintiffs' attorneys, threatens to ruin federal courts and to bankrupt local governments. However, this image of civil rights litigation — and of the lawyers who represent plaintiffs in such litigation — does not comport with the facts established by empirical evidence. The reality is that § 1983 cases account for only a small fraction of the cases filed in the federal courts each year; that they do not differ significantly from non-civil rights cases in either the percentage of cases going to trial or the median time for disposition; that plaintiffs in such cases are substantially less likely to obtain any relief than plaintiffs in non-civil rights cases; that the few cases in which plaintiffs receive a remedy through either settlement or trial typically involve relatively minor amounts of both damages and counsel fees; and that the fiscal problems confronting local governments, while sometimes serious, are virtually never related to § 1983 litigation or to § 1988 attorneys' fees.

The legislative history of § 1988 demonstrates congressional recognition, in the wake of this Court's *Alyeska* decision, that victims of civil rights violations did not have effective access to the judicial process: government lawyers were not available to represent such victims (indeed, they usually represented the opposition); these victims could not afford to purchase legal services at the hourly

rates set by the private market; and the contingent fee arrangements that made legal services available to victims of personal injuries did not work for victims of constitutional violations, whose cases were complex, unlikely to be successful and, even if successful, likely to produce only small monetary recoveries.

Congress therefore enacted § 1988 to effectuate civil rights laws by assuring that private lawyers would be compensated for the substantial expenditures of time and effort necessary to represent plaintiffs effectively in actions brought to enforce those laws. Fully aware that such representation was difficult and time-consuming, and that the damage remedies available to plaintiffs as a result of such representation were often limited and sometimes nonexistent, Congress nonetheless decided that counsel for prevailing plaintiffs should be compensated for all time they reasonably expended on a case. In making this determination, Congress examined data showing that counsel fee awards made under comparable fee-shifting statutes in antitrust cases varied widely in relation to the damages recovered by plaintiffs in such cases. The fees awarded to plaintiffs' counsel in some antitrust cases were many times greater than the damages recovered by the plaintiffs. Against this background, Congress concluded that "the amount of fees awarded under [§ 1988 should] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases[,] and not be reduced because the rights involved might be nonpecuniary in nature." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976).

Congress thus recognized that it would be appropriate and even necessary in some cases to award fees to plaintiffs' counsel under § 1988 that were disproportionate to the amount of damages recovered by plaintiffs under § 1983. The record here demonstrates that this is such a case. The Court in *Hensley* adopted guidelines for calculating reasonable fees that are in accord with the intent of Congress, and the courts below correctly applied these guidelines in awarding and affirming the fee in the present case. These guidelines, in conjunction with other safeguards, more than adequately protect defendants against awards of unreasonably large counsel fees in civil rights cases.



## ARGUMENT

Only three years ago this Court in *Hensley* took the "opportunity to clarify the proper relationship of the results obtained to an award of attorney's fees" under § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 432 (1983). The Court rejected a mechanical proportionality approach to the award of fees—either between issues raised and issues prevailed upon or between relief sought and relief obtained—and instead adopted the more contextualized approach expressly preferred by Congress. *Id.* at 434-37 & n.11; *Blum v. Stenson*, 104 S. Ct. 1541, 1546 (1984). Petitioners and amici now urge that the fee awards under § 1988 must be mechanically proportional to damages awarded in civil rights actions and thus, in effect, overrule *Hensley*.

In advocating this approach, petitioners and amici understandably downplay the legislative history and rely instead on a concern for the destructive impact of § 1983 litigation on the judiciary, local governments and officials and taxpayers. Because the impact of § 1983 litigation thus provides important background for the resolution of the question before this Court, the arguments in this brief will be presented in an unusual order. Respondents first will examine the reality behind the presumed destructiveness of these civil rights cases. Then respondents will demonstrate that in *Hensley*, contrary to petitioners' and amici's arguments, this Court was correct in its reading of § 1988's legislative history and in its determination of the guidelines for awarding reasonable—and not excessive or inadequate—attorney's fees. Finally, respondents will show that the District Court and the Court of Appeals properly applied the *Hensley* guidelines in this case.

# **I. THE CONSTRUCTION OF § 1988 URGED BY PETITIONERS AND AMICI IS BASED ON UNSUPPORTED AND ERRONEOUS ASSUMPTIONS ABOUT THE NATURE OF § 1983 LITIGATION IN THE FEDERAL COURTS**

The concern that § 1983 litigation is destructive rests on three overlapping and reinforcing assumptions about its impact. First, many assume that an excessive number of § 1983 cases is now before the federal district courts. Second, most presume this number of cases unduly burdens courts and defendants. Finally, many attribute the perceived "liability crisis" confronting local governments to routinely huge § 1983 damage awards and § 1988 fee awards.

An examination of available research, however, exposes the error of each of these assumptions. This re-



search includes empirical studies of § 1983 litigation that focus on the Central District of California where this case was brought.<sup>22</sup> These § 1983 studies draw support from recently completed empirical projects on a wide range of civil litigation in this country.<sup>23</sup> These projects conclude not only that we are not nearly so litigious (either in absolute or relative terms) as popular descriptions be-moan, but that we are least likely to sue when pressing discrimination claims against governments. Finally, both a federal study and other reports conclude that fiscal problems confronting local governments, while sometimes serious, are almost never catastrophic and almost entirely unrelated to § 1983 litigation.<sup>24</sup>

The empirical studies are revealing in two respects. First, they point out the deficiencies in the statistics published by the Administrative Office of the U.S. Courts,

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<sup>22</sup> Eisenberg & Schwab, *The Realities of Constitutional Tort Litigation* ("Realities") (1986) (study presented at the Association of American Law Schools 1986 Annual Conference); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study* ("Section 1983"), 67 Cornell L. Rev. 482 (1982). A copy of *Realities* is being lodged with the Clerk of the Court and a copy provided to petitioners.

<sup>23</sup> D. Trubek et al., *Civil Litigation Research Project Final Report* ("Civil Litigation") (1983); Galanter, *Reading The Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society* ("Landscape of Disputes"), 31 UCLA L. Rev. 4 (1983); Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture* ("Adversary Culture"), 15 Law & Society Rev. 525 (1980-81).

<sup>24</sup> Advisory Commission on Intergovernmental Relations, *Bankruptcies, Defaults, and Other Local Government Financial Emergencies* ("Local Government Financial Emergencies") (1985); see also *N. Y. Times*, May 12, 1985, at 1.



the source of nearly all previous data about the volume of § 1983 cases. A major problem with these statistics is how cases are classified. While the Administrative Office data lump all "civil rights" cases together, empirical studies conclude that only about one-third of these cases are § 1983 cases.<sup>25</sup> The difference is significant in understanding the impact of § 1983 litigation. For example, the Administrative Office data show 441 nonprisoner civil rights cases filed in the Central District for the 1980-81 fiscal year.<sup>26</sup> By contrast, the Central District's court records and pleadings reveal 144 nonprisoner § 1983 cases<sup>27</sup> filed in that fiscal year.<sup>28</sup>

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<sup>25</sup> The earlier of the two § 1983 studies concludes that § 1983 cases "constitute only about one-third, and certainly not more than one-half, of the cases the Administrative Office classifies as civil rights cases." *Section 1983* at 533. The later study concludes that only about one-third of the Administrative Office "civil rights" cases are § 1983 cases. *Realities* at 12.

<sup>26</sup> *Realities* at 12.

<sup>27</sup> The special nature of prisoner § 1983 cases justifies the treatment they typically receive as a special category. See, e.g., Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts* ("When Prisoners Sue"), 92 Harv. L. Rev. 610 (1979). Nonetheless, data concerning prisoner § 1983 cases from the empirical studies of the Central District reveal patterns similar to those for nonprisoner § 1983 cases, and may be reviewed both in the Appendix to this brief and in *Section 1983 and Realities*.

<sup>28</sup> *Realities* at 12-13. If one includes employment discrimination claims brought under both Title VII and § 1983, approximately 178 cases may be classified as § 1983 cases. *Id.* at 13. Of the 144 non-Title VII § 1983 cases, seven involved transparently erroneous reliance upon § 1983, leaving 137 "true" § 1983 cases. *Id.* For a similar contrast between the Administrative Office data and the number of nonprisoner § 1983 cases actually filed in the Central District for the years 1975 and 1976, see

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In addition to rejecting the indiscriminate use of the Administrative Office statistics as "a measure of the number of, or long-term growth of, section 1983 cases,"<sup>29</sup> these studies indicate that § 1983 cases burden courts and defendants significantly less than do other classes of cases. For example, in fiscal year 1980-81, there were 6.4 non-civil rights tort cases and 2.1 copyright, patent and trademark suits filed in the Central District for every § 1983 case filed.<sup>30</sup>

A closer look at the impact of § 1983 cases on the judiciary also undermines the statute's reputation for overwhelming judges. For example, for the fiscal year 1980-81 there were 10.6 nonprisoner § 1983 filings per judgeship.<sup>31</sup> During the five years between the two studies of the Central District, § 1983 cases actually decreased as a percentage of the Central District's total civil docket (from 5.56% in the years 1975-1976 to 3.8% for the fiscal year 1980-81) — a particularly noteworthy development since the Civil Rights Attorney's Fees Awards Act was approved on October 19, 1976.<sup>32</sup>

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*Section 1983* at 526, 550 & 551. It is also noteworthy that the number of nonprisoner § 1983 cases filed in the Central District in fiscal 1980-81 increased only eight from 1976 and four from 1975. See *id.* and *Realities* at 12-13.

<sup>29</sup> *Section 1983* at 536. See also *Realities* at 12.

<sup>30</sup> *Realities* at 13-14, 17 & Table IV; Administrative Office of the United States Courts, *Management Statistics for the United States Courts 1982* at 105.

<sup>31</sup> *Realities* at 16. For data revealing similar patterns for the calendar years 1975 and 1976, see *Section 1983* at 531. See also Table I, Appendix to this brief.

<sup>32</sup> *Id.* at 19.

Even the total number of § 1983 cases actually filed overstates the burden on courts and defendants. While there is no standard method for measuring the workload generated by a particular group of cases, relevant information includes the number of answers filed, the number of hearings before the court, the amount of "paper pushed" (interrogatories and depositions), and the median time to disposition. Out of 178 § 1983 cases filed in fiscal year 1980-81,<sup>33</sup> answers were filed in 115;<sup>34</sup> hearings were held in 101;<sup>35</sup> depositions were taken in 101 and interrogatories were served in 57.<sup>36</sup> The median disposition time for § 1983 cases in 1980-81 was 11.57 months.

The number of trials and the number of dismissals for lack of prosecution corroborate these data. In 1976, about seven percent of § 1983 cases filed in the Central District resulted in trial; and in fiscal 1980-81, about ten percent resulted in trial.<sup>37</sup> Twelve percent of the nonprisoner § 1983 cases filed in the Central District in 1976 were dismissed for lack of prosecution.<sup>38</sup> By comparison, trials occurred in about 48% of all cases filed in fiscal year 1976 in California's superior courts, the principal state courts

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<sup>33</sup> The total of 178 cases for fiscal year 1980-81 includes those cases combining Title VII and § 1983 claims. Comparable data for 1975 and 1976 are reported in Table II, Appendix to this brief.

<sup>34</sup> *Realities* at Table III.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Section 1983* at 526; *Realities* at Table II. See also Table II, Appendix to this brief.

<sup>38</sup> *Section 1983* at 532.

of general jurisdiction.<sup>39</sup> And in fiscal year 1976, cases dismissed for lack of prosecution comprised less than 1.5% of the civil cases filed in California's superior courts.<sup>40</sup>

These findings, together with the only other similar studies undertaken,<sup>41</sup> shatter the image of courts clogged with § 1983 cases. In fact, other studies suggest that claims central to § 1983's historical purpose are litigated not too much, but too little: less well-educated people tend not to perceive constitutional injuries,<sup>42</sup> and even when they do perceive injury, are more inclined toward resignation ("lumping it").<sup>43</sup>

What fiscal burden do § 1983 cases in fact impose on local governments? The studies of the Central District of California conclude that there is not a significant shift of public funds to § 1983 plaintiffs.<sup>44</sup> In 1980-81, plaintiffs achieved a successful outcome (any settlement or trial) in 50% of the § 1983 cases filed.<sup>45</sup> By contrast, plaintiffs in

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<sup>39</sup> National Center for State Courts, *State Court Caseload Statistics: Annual Report, 1976* at 169.

<sup>40</sup> See *id.*

<sup>41</sup> These findings are consistent with other studies. See Section 1983 at 525; Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois*, 6 Loy. U. Chi. L. J. 527 (1975); Turner, *When Prisoners Sue*, 92 Harv. L. Rev. 610; Project, *Suing the Police in Federal Courts ("Project")*, 88 Yale L. J. 781 (1979).

<sup>42</sup> B. Curran, *The Legal Needs of the Public: A Final Report of a National Survey* 126 (1977).

<sup>43</sup> See Miller and Sarat, *Adversary Culture*, 15 Law & Society Rev. at 545; see also *id.* at Table 2; Galanter, *Landscape of Disputes*, 31 UCLA L. Rev. at 14; D. Trubek et al., *Civil Litigation* at S-20.

<sup>44</sup> Section 1983 at 527; *Realities* at Table V.

<sup>45</sup> *Realities* at 2-3. For comparable percentages for the years 1975 and 1976, see Section 1983 at 527-28.

a control group of 204 non-civil rights cases achieved success in 84% of the cases filed in the Central District in 1980-81, a finding consistent with earlier studies showing that plaintiffs in personal-injury tort cases obtain a 90% success rate.<sup>46</sup> Moreover, judgments and settlements in the § 1983 suits in the Central District often involved relatively minor amounts, as did fees awards.<sup>47</sup> These findings correspond with a Connecticut study that found infrequent and diminutive damage awards and settlements for modest sums in § 1983 cases against police officers,<sup>48</sup> and with data reported in a survey of local governments.<sup>49</sup>

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<sup>46</sup> *Realities* at 2 & nn. 2 & 3. See also Franklin, Chanin, & Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 Colum. L. Rev. 1, 10-11, 13-14 (1961); Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 Stan. L. Rev. 1125, 1145 n.45 (1970).

<sup>47</sup> *Section 1983* at 530; *Realities* at Table V. Indeed, the study of cases filed in the years 1975-1976 characterizes *Rivera v. City of Riverside* as one of only two exceptions "to the pattern of little or no financial recovery" for § 1983 plaintiffs. *Section 1983* at 529. The study concludes that, given their facts, neither case involves "excessive recovery," and neither case alters the "general impression about the [financial] impact of section 1983 litigation." *Id.* at 529-30.

<sup>48</sup> *Project*, 88 Yale L. J. at 813.

<sup>49</sup> The National Institute of Municipal Law Officers (NIMLO) sent a questionnaire to local governments asking them, among other things, to "[l]ist the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed." *Municipal Liability Under 42 U.S.C. § 1983: Hearings on S. 584, S. 585, and S. 990 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 155 (Exhibit A to NIMLO's statement) (1981). Of those questionnaire responses submitted to

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In addition, empirical findings of a recent national study of local government finances belie any argument that § 1983 is the cause of a liability crisis. The Advisory Commission on Intergovernmental Relations (ACIR) concluded in a 1985 special report that "financial management problems" were the principal cause of financial emergencies for local governments from 1972 to 1983, and it anticipated no change in that situation.<sup>50</sup> "Civil rights" cases merited only a brief reference in the report; ACIR concluded that those cases had not "generally resulted in large financial judgments."<sup>51</sup> And while tort judgments against local governments, frequently predicated on recently expanded "joint and several" liability rules in some states, have led some insurance carriers to withdraw from the municipal liability market and others dramatically to increase rates, this problem has virtually nothing to do with § 1983 litigation.<sup>52</sup>

The reality of § 1983 litigation fundamentally contradicts the apocalyptic image petitioners and amici invoke

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Congress, 22 local governments reported no judgments or settlements in excess of one dollar, 10 others reported judgments or settlements totaling less than \$10,000, and two reported judgments or settlements totaling between \$25,000 and \$50,000. *Id.* at 155-251. These data contradicted NIMLO's dire view of § 1983's fiscal impact on local governments. *Id.* at 49.

<sup>50</sup> *Local Government Financial Emergencies* at 5.

<sup>51</sup> ACIR, after noting the unusual situation where, apparently to settle a discrimination suit, Bridgeport, Connecticut, issued \$6 million in bonds, offered the following brief caution: "While discrimination judgments may generally be of a magnitude that can be handled by local governments, there may be governments unable to cope financially with such awards." *Id.* at 5-6.

<sup>52</sup> See *N. Y. Times*, Sept. 30, 1985, at 13.

in their briefs.<sup>53</sup> This Court should not overturn *Hensley* and impose a rule of strict or mechanical proportionality between fee and damage awards on the basis of erroneous assumptions that § 1983 litigation has inundated federal courts or weakened local governments.

## II. THE LEGISLATIVE HISTORY OF § 1988 DEMONSTRATES THAT CONGRESS CORRECTLY UNDERSTOOD THE NATURE OF § 1983 LITIGATION, INCLUDING THE NEED IN SOME CASES FOR AWARDS OF COUNSEL FEES THAT ARE DISPROPORTIONATE TO THE AMOUNT OF DAMAGES RECOVERED BY PLAINTIFFS

The Court in prior cases has thoroughly reviewed the legislative history of § 1988. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Blum v. Stenson*, 104 S. Ct. 1541 (1984); *Webb v. Board of Education*, 105 S. Ct. 1923 (1985). This history shows that Congress, in the wake of this Court's decision in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), (1) reviewed the evidence on the effectiveness of private enforcement of civil rights laws, and (2) found the need to narrow the significant disparity in legal representation and resources between opposing parties in civil rights cases,<sup>54</sup> particularly where defendants are governments and public officials with "substantial resources available to them through

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<sup>53</sup> Indeed, as counsel for petitioners said in 1984 to the District Judge, "the City of Riverside hasn't paid a penny other than the deductible and that was years ago." (J.A. 241).

<sup>54</sup> See, e.g., *The Effect of Legal Fees on the Adequacy of Representation*, Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 834-35 (1973) (testimony of Dennis M. Flannery); *Awarding of Attorneys' Fees*, Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 128 (1975) (testimony of Charles R. Halpern); *id.* at 79 (testimony of Charles A. Hobbs).



funds in the common treasury, including the taxes paid by the plaintiffs themselves.” H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976) (“House Report”).<sup>55</sup>

Petitioners and amici concede that Congress enacted § 1988 to assure persons with civil rights grievances effective access to the judicial process by providing for awards of attorneys’ fees “‘Which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.’” *Hensley*, 461 U.S. at 430 n.4, quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976) (“Senate Report”). Cf. House Report at 9. (See, e.g., P.Br. at 9; S.G.Br. at 9). But, having made this concession, they then attempt to transform congressional concern for “windfalls” into a requirement of proportionality between fees and damages. Not only do petitioners and amici fail to offer support in the legislative history for this rewriting of § 1988, but they ignore congressional findings and choices inconsistent with their efforts to legislate strict proportionality through this case.

**A. Finding That the Private Market for Legal Services Did Not Insure Adequate Enforcement of the Civil Rights Laws, Congress Determined That Attorneys for Prevailing Plaintiffs Should Be Compensated for All Time Reasonably Expended on Such Cases**

In evaluating the evidence before it, Congress concluded — contrary to the assumption of the Solicitor General in the present case — that the “workings of the pri-

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<sup>55</sup> See also *Hutto v. Finney*, 437 U.S. 678, 694 (1978) (“‘The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities,’” quoting House Report at 7).

vate market for legal services" (S.G.Br. at 13)<sup>56</sup> did not provide the legal representation and resources necessary to narrow the economic gap between civil rights plaintiffs, on the one hand, and government and corporate defendants, on the other. Congress made three principal findings about the private market's failure to provide legal services sufficient to insure protection of civil and constitutional rights:

—First, Congress found that civil rights plaintiffs could not afford to hire lawyers at the rates set by the private market. House Report at 1. See also Senate Report at 2.

—Second, Congress found that private lawyers were not willing to donate their time<sup>57</sup> but, on the contrary, "were refusing to take certain types of civil rights cases

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<sup>56</sup> The Solicitor General argues that the contingent fee market for personal injury suits should govern and limit § 1988 fee awards for § 1983 cases resulting "only" in damage awards. This argument not only ignores legislative history but misuses authority. In urging reliance on the contingent fee market for personal injury suits, the Solicitor General quotes the statement in *Blum v. Stenson*, 104 S. Ct. at 1547 n.11, that "the rates charged in private representations may afford relevant comparisons." See S.G.Br. at 19. But the Solicitor General neglects to quote the immediately preceding sentence in *Blum*: "Nevertheless, . . . the critical inquiry in determining reasonableness is now generally recognized as the appropriate *hourly* rate." *Id.* (emphasis added). Moreover, the Solicitor General ignores this Court's recognition in *Blum* that Congress "directed that attorney's fees [under § 1988] be calculated according to standards currently in use under other fee-shifting statutes," particularly "'other types of equally complex Federal litigation, such as antitrust cases . . .'" *Id.*, quoting Senate Report at 6.

<sup>57</sup> Nor does the profession require lawyers to donate time. See Rule 6.1, ABA Model Rules of Professional Conduct (adopted Aug. 2, 1983) ("[a] lawyer *should* render public interest legal service" (emphasis added)).

because the civil rights bar, already short of resources, could not afford to do so." House Report at 2.

—Third, Congress found that the contingent fee system that provided access to the courts for most victims of serious personal injuries did not work for the victims of serious civil rights violations.<sup>58</sup> Recognizing that private attorneys are not often lured by the prospect of recovering a percentage of a small and uncertain monetary judgment in exchange for devoting hundreds or thousands of hours to a case over a period of many years,<sup>59</sup> Congress confronted the reality of the market failure:

"[W]hile damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and neces-

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<sup>58</sup> See, e.g., 122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy).

<sup>59</sup> Ignoring this congressional finding, the Solicitor General contends that "[t]he prospect of recovering \$11,000 for representing respondents in their suit (assuming a contingency rate of 33%) is likely to attract a substantial number of attorneys." S.G.Br. at 22-23. In findings of fact that the Solicitor General does not contest (see *id.* at 12-13), the District Court found that, between August 1975 and November 1980, plaintiffs' counsel devoted a total of 1,946.75 hours to this case, and that this amount of time was reasonable and reflected sound legal judgment under the circumstances. (J.A. 189-90). Plaintiffs' counsel have not yet received any fees for this work. Thus, it appears to be the view of the Solicitor General that the prospect of working nearly 2,000 hours at a rate of \$5.65 an hour, which will be paid (if at all) not less than ten years after the work began, is "likely to attract a substantial number of attorneys" to handle such cases. (S.G.Br. at 23).

sary if Federal civil and constitutional rights are to be adequately protected." House Report at 8.<sup>60</sup>

In enacting § 1988, Congress thus determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff, . . . [and] that it would be better to have more vigorous enforcement of civil rights laws than would result if plaintiffs were left to finance their own cases." *Hensley*, 461 U.S. at 444 n.4 (Brennan, J., concurring in part and dissenting in part).<sup>61</sup> To effectuate this goal, Congress designed a statute that would assure compensation of plaintiffs' attorneys "'for all time reasonably expended on a matter.'" Senate Report at 6, quoting *Davis v. County of Los Angeles*, 8 E.P.D. ¶9444, at 5049 (C.D. Cal. 1974).

**B. Congress Recognized and Intended That the Amount of Fees Awarded to Plaintiffs' Attorneys in Some Cases Would Be Disproportionate to the Amount of Damages Recovered by the Plaintiffs**

<sup>60</sup> Empirical studies uniformly support this congressional finding regarding the unavailability or severely limited nature of damage awards in civil rights litigation. See, e.g., *Section 1983*, 67 Cornell L. Rev. at 530; *Realities* at Table V; *Project*, 88 Yale L.J. at 813.

<sup>61</sup> Contrary to the statement in Justice Rehnquist's in chambers opinion in this case, Congress did indeed "intend . . . by § 1988 to authorize a prevailing plaintiff to obtain more generous court-ordered attorney's fees from a defendant than the plaintiff's attorney might himself have fairly charged to the plaintiff in the absence of a fee-shifting statute." *City of Riverside v. Rivera*, 106 S. Ct. at 8. The legislative history reveals that Congress enacted § 1988 because the private market did not provide sufficiently "generous" fees to assure an adequate level of law enforcement. See 122 Cong. Rec. 31832 (1976) (remarks of Sen. Hathaway) ("[i]n the typical case arising under these civil rights laws, the citizen who must enforce the provisions through the courts has little or no money with which to hire a lawyer, and there is often no damage claim from which an attorney could draw his fee").

In designing § 1988, Congress understood and accepted that reasonable attorney's fees sometimes would be disproportionate to the amount of damages recovered by plaintiffs under § 1983 and other civil rights statutes. This would have to be so if, as Congress intended, "neither the mere recovery of damages" nor the fact that "only injunctive relief is sought" should preclude the award of fees. See, e.g., House Report at 8-9.

Moreover, as the Court noted in *Hensley*, Congress intended that fee awards under § 1988 would be computed in accordance with the standards of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which were "correctly applied" in three cases cited in the Senate Report: *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975); and *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978). *Hensley*, 461 U.S. at 429-31 & n.4, quoting Senate Report at 6. According to the cited opinions, the plaintiffs in none of these cases recovered any monetary damages, but the attorneys in each of these cases were awarded substantial fees. The plaintiffs in *Davis* and *Swann* obtained only injunctive relief, but the courts made fee awards to plaintiffs' counsel of \$60,000 in *Davis*, 8 E.P.D. at 5048, and \$179,000 in *Swann*, 66 F.R.D. at 486. The plaintiffs in *Stanford Daily* obtained neither injunctive relief nor damages, but only a declaratory judgment that their constitutional rights had been violated. 64 F.R.D. at 681. The court awarded \$47,500 in fees to their attorneys. *Id.* at 688.<sup>62</sup>

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<sup>62</sup> Thus, if respondents in the present case had sought and obtained only declaratory relief, their attorneys unquestionably



The issue of proportionality also was addressed by some members of Congress who expressed at length their concern that awarding fees for all time reasonably expended might result in large fee awards in relation to the amount of damages recovered. See, e.g., 122 Cong. Rec. 32392-93 (1976) (remarks of Sen. Thurmond); *id.* at 31850 (remarks of Sen. Allen); *id.* at 32394 (remarks of Sen. Helms); *id.* at 35117 (remarks of Rep. Hyde). They predicted, as petitioners and amici underscore (see, e.g., S.G.Br. at 16), that the bill would prove to be something of a "Civil Rights Attorneys Relief Act" that would guarantee large fees to attorneys. *Id.* at 31850 (Sen. Allen).

To illustrate this concern, Senator Thurmond read during the floor debate and offered for inclusion in the Congressional Record a 1972 study of attorney's fees in antitrust cases. See Note, *Attorneys' Fees in Individual and Class Action Antitrust Litigation*, 60 Cal. L. Rev. 1656 (1972), reprinted in 122 Cong. Rec. 32389 (1976). That study found, *inter alia*, that court ordered fee awards in antitrust cases ranged from 13.6% to more than 4300% of the single damages awarded. 60 Cal. L. Rev. at 1679-82.<sup>63</sup>

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would have been entitled to full compensation for all time reasonably spent on the case. There is no evidence that Congress intended to *reduce* fees where, as here, plaintiffs obtained not only a determination that their rights have been violated but also a judgment for damages. To the contrary, Congress specified that fees should "not be reduced because the rights involved may be nonpecuniary in nature." *Hensley*, 461 U.S. at 430 n.4, quoting Senate Report at 6.

<sup>63</sup> This broad range of fee awards in relation to damage awards in the antitrust cases examined by Congress is predictable given the broad range in complexity and significance of cases. Still

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Senator Thurmond warned that, under the language of the bill, fees might be similarly high in comparison to the damages awarded in civil rights cases. 122 Cong. Rec. at 32393 (1976).

With this evidence before it and despite the loud protestations of those members opposing the bill, Congress expressly adopted fee awards in antitrust cases as a model for fee awards in civil rights cases: "It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards whic' prevail in other types of equally complex Federal litigation, *such as antitrust cases*[,] and not be reduced because the rights involved might be nonpecuniary in nature." Senate Report at 6 (emphasis added). See also House Report at 8-9.<sup>64</sup>

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it is noteworthy that this broad range did not produce unreasonably high fees in antitrust cases overall: the mean of the fee awards in these cases amounted to 176% of the single damages awarded. See 60 Cal. L. Rev. at 1670-82. A recent empirical study indicates that fee awards in antitrust cases continue to follow the same general patterns observed by Congress in 1976. See Elzinga & Wood, *The Cost of the Legal System in Private Antitrust Enforcement* (paper presented at Georgetown Law Center Conference on Private Antitrust Litigation, Nov. 8, 1985, forthcoming in S. Salop & I. White, eds., . . . (MIT Press, 1986)).

<sup>64</sup> The Solicitor General quotes Senator Kennedy's observation that "[w]e are not talking about the kind of attorneys' fees that were included in the antitrust bill. You do not get rich from protecting civil rights of citizens . . . . And the determination of fees is left, in any event, to the discretion of the courts." S.G.Br. at 16, quoting 122 Cong. Rec. 31851 (1976), Senator Kennedy made this comment on September 22, 1976 in response to Senator Allen's implication that civil rights attorneys, like antitrust attorneys, will collect "literally millions of dollars for their services." *Id.* at 31473; see also *id.* 31474. Senator Kennedy's comments refer to the absolute size of attorney's fees under § 1988, and not to the relationship between fee awards and damage awards in antitrust cases specifically detailed by Senator Thurmond five days later on September 27, 1976. See *id.* at 32393.



This legislative history is unambiguous: Congress wanted to assist civil rights plaintiffs by providing fees for their attorneys, and it recognized that a reasonable fee could be a large one in relation to the amount of damages.

**III. THE GUIDELINES ADOPTED IN *HENSLEY* AND APPLIED BY THE LOWER COURTS IN THE PRESENT CASE IMPLEMENT THE INTENT OF CONGRESS AND, IN CONJUNCTION WITH OTHER SAFEGUARDS, PROTECT AGAINST AWARDS OF UNREASONABLY HIGH FEES IN CIVIL RIGHTS CASES**

Petitioners and amici inaccurately describe both the lower courts' application of *Hensley's* guidelines and the existing safeguards against awards of unreasonably high attorney's fees under § 1988.<sup>65</sup> Contrary to their assertions, a review of the District Court's award and its exercise of discretion in arriving at the award reveals that *Hensley's* guidelines have been carefully met. Furthermore, a description of the actual world of civil rights liti-

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<sup>65</sup> Petitioners' and amici's statements on these points fail to account for the scope of the constitutional wrongdoing found by the District Court, and badly mischaracterize the world of civil rights lawyering. Plaintiffs' case challenged the outrageous, discriminatory behavior of numerous police officers and city officials, and implicated longstanding city policies of mistreatment of Chicanos. The Solicitor General, however, regards it as "a tort suit brought essentially for the monetary benefit of the individual plaintiffs whose rights were violated" (S.G. Br. at 12), and petitioners describe it as achieving results which "are indeed nominal. . . ." (P.Br. at 15). They also describe a world of lawyering where "there is a low risk opportunity for attorneys to greatly increase their incomes" (P.Br. at 9), a world where "lawsuits of marginal worth are being filed so as to achieve the magical goal of 'prevailing party' status under § 1988, and thus, to open to these attorneys the coffers of defendant municipalities, states and other governmental agencies." (P.Br. at 26). The facts of this case alone refute each element of petitioners' and amici's description of civil rights lawyering.

gation reveals significant safeguards — available both to courts and to defendants — that together with *Hensley* protect against unreasonably high fee awards under § 1988.

### **A. The District Court Properly Applied *Hensley's* Guidelines in Awarding Fees in this Case**

In May 1983 this case was remanded “for further consideration in light of *Hensley*.” On remand, the District Court held two additional hearings on the application of *Hensley* — on October 24, 1983, and on June 5, 1984. Before each hearing, the District Court reviewed both the pre-remand record and all new papers filed by plaintiffs; defendants filed no new papers and presented no new evidence. (J.A. 224, 233).<sup>66</sup> The District Court took a full six and one-half months between the first and second hearings to retrieve and review the entire record and to recon-

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<sup>66</sup> As evidence that the District Court “openly def[ie]d” *Hensley* (Bliley Br. at 4), petitioners and amici offer the following statement made by the District Court at the first post-remand hearing: “I tell you now that I will not change the award. I will simply go back and be more specific about it.” (See, e.g., P.Br. at 25). In quoting out of context the District Court’s tentative ruling, petitioners and amici fail to note (1) that before this hearing plaintiffs had filed and the District Court had read an extensive memorandum addressing the application of *Hensley* on remand (J.A. 224); (2) that both the memorandum and plaintiffs’ counsel at that same hearing had stressed, consistent with *Hensley* itself (461 U.S. at 438), that the District Court’s original award might well comply with *Hensley*, but that *Hensley* required more specific (“concise but clear,” *id.* at 424) findings concerning the relationship between the extent of success and the amount of the fee award (see, e.g., J.A. 228); (3) that earlier at that same hearing, the District Court had indicated, after studying *Hensley* and its own original findings, its agreement with this position (J.A. 228); and (4) that immediately after announcing its tentative ruling, the District Court indicated its intention to review the record again in light of defendants’ assertions that the original award was not supported by the record. (J.A. 230-31).

sider the fee award in light of *Hensley's* standards. (J.A. 232-33). On July 26, almost two months after the second post-remand hearing, the District Court issued comprehensive Findings of Fact and Conclusions of Law, specifically considering the relationship between the fee award and the overall relief obtained, and explaining the reasons for the award concisely but clearly as required by this Court. 461 U.S. at 437.

The District Court's findings reveal conscientious application of the *Hensley* guidelines. On the basis of plaintiffs' success on the central issue of police misconduct, the District Court made the threshold determination that plaintiffs were the prevailing parties. (J.A. 191).<sup>67</sup> The District Court then reviewed its calculation of the base fee (the product of reasonable hours times reasonable rate),<sup>68</sup> and found (1) that the "amount of time expended by counsel in conducting this litigation was reasonable and reflected sound legal judgment under the circum-

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<sup>67</sup> Contrary to the Solicitor General's unsupported assertion (S.G.Br. at 27), this Court has held that district courts may award fees under § 1988 for state pendent claims upon which plaintiffs prevail — even when the court declines to enter judgment on the federal civil rights claims. See *Maier v. Gagne*, 448 U.S. 122, 132-33 & n.15 (1980). See also *Maine v. Thiboutot*, 448 U.S. 1, 11 & n.12 (1980) (holding that § 1988 applies to claims brought in state courts).

<sup>68</sup> For this reconsideration (as with the original calculation) of the base fee, plaintiffs reminded the District Court that the number of hours reflected not only the complexity of the case (see, e.g., Trial Court Docket Sheets (12 pages), Ninth Circuit Excerpts of Record at 1-12), but also the defendants' obstructive litigation tactics (see, e.g., J.A. 32-33): frivolous objections were made to obviously relevant discovery requests, legal issues were frequently misconstrued, a vexatious and meritless suit against plaintiffs and their counsel had to be removed to and then dismissed by the District Court, and trial on the merits was made necessary because, in the words of the District Court, "no adequate offer was ever suggested." (J.A. 237-38).

stances,”<sup>69</sup> and (2) that the hourly rate used was “typical of the prevailing market rate for similar services by lawyers of comparable skill, experience and reputation within the Central District at the time these services were performed.” (J.A. 190).<sup>70</sup>

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<sup>69</sup> Petitioners list categories of work and a corresponding number of attorney-hours expended as conclusive evidence that this base fee was unreasonably high. (J.A. 12-13). Petitioners’ tally of hours is often inscrutable or incorrect. More importantly, petitioners fail to offer reasons, of which they are aware, that the lower courts twice rejected each of these unsupported assertions. For example, petitioners describe Mr. Cazares’ “stand-by” time as “perhaps the most outrageous entry of all. . . .” (P.Br. at 12.) As petitioners and the lower courts know, Mr. Cazares tried the lawsuit alone; Mr. Lopez was present at the trial for only a few hours of one day of the total of nine days of testimony. Little wonder that Mr. Cazares (and not Mr. Lopez) was on call, with the District Court’s knowledge and without objection by petitioners’ counsel, to help respond to questions posed by the jury during its deliberation. In another example, petitioners condemn the amount of time spent preparing jury instructions, informing the Court parenthetically that the instructions “were subsequently mostly discarded by the trial court. . . .” But petitioners neglect to inform the Court that, in response to this very same “factual” assertion, the District Court responded: “No, I didn’t. No, I didn’t. I think those were very good instructions. . . .” (J.A. 215). At a later hearing, referring to the complexity of the issues covered by the instructions, the District Court noted that “[i]t took two of my clerks one whole week to just sort out the jury instructions which I gave them with notes and comments I myself made.” (J.A. 237).

<sup>70</sup> Because plaintiffs’ lawyers were relatively young when this litigation began, petitioners claim the hourly rate was too high and the hours expended were excessive. (See, e.g., P.Br. at 20). In response to similar assertions made at the post-remand hearings, the District Court observed that “[t]here was not any possible way that [plaintiffs’ attorneys] could have avoided putting in that amount of time . . .” (J.A. 238), and that “[t]hey were two of the best lawyers who have ever appeared in a civil rights case here in this courtroom, and they did an absolutely superb job.” (J.A. 230). In these determinations, the District Court drew upon its considerable billing and litigation experience (see n.3 *supra*) and followed *Johnson v. Georgia Highway Express*, where the court observed that years of experience is not the most significant factor: “If a young attorney demonstrates the skill and ability, he should not be penalized for only recently being admitted to the bar.” 488 F. 2d at 718-19.

The District Court then examined factors that could, under *Hensley*, lead to an adjustment of the “presumptively reasonable fee of rate times hours.” *Blum v. Stenson*, 104 S. Ct. at 1550 n.18. Because “results obtained” is a particularly important factor where plaintiffs did not prevail on all claims, the District Court focused on the relationship between the relief granted and the attorney’s fees awarded.<sup>71</sup> Carrying out inquiries required by *Hensley*, 461 U.S. at 434, the District Court found that the “claims on which plaintiffs did not prevail were closely related to the claims on which they did prevail,” and that plaintiffs “achieved a level of success . . . that makes the total number of hours expended by counsel a proper basis for making the fee award.” (J.A. 189-90).

Defendants requested that the fee award be reduced on the grounds that some defendants were dropped from the case prior to the end of trial.<sup>72</sup> The District Court based its rejection of defendants’ argument on the difficulty of associating individual defendants with particular actions during a chaotic incident involving many parties,<sup>73</sup> and on

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<sup>71</sup> The District Court also expressly discussed several other *Johnson* factors, including both factors related to the determination of the base fee (time and labor required, novelty and difficulty of the questions, skill and experience of the attorneys, customary fee) and other factors bearing on adjustment of the base fee (undesirability of the case, nature and length of professional relationship with client). (J.A. 188-92).

<sup>72</sup> Petitioners inaccurately report that this issue “never became a matter of inquiry (or, apparently, concern) to the District Court. . . .” (P.Br. at 17).

<sup>73</sup> The District Court noted that even at trial “the testimony of the parties and the witnesses was often in conflict as to the role of the individual officers in the events of the evening.” (J.A. 188). At the second post-remand hearing, the District Court stated that “it would have been wrong for you [plaintiffs and plaintiffs’ counsel] not to join all those officers since you yourself did not know precisely who were the officers who were responsible.” (J.A. 236). The Ninth Circuit did not permit

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the interrelatedness of the claims against the individual defendants and the City of Riverside. (J.A. 187-88).<sup>74</sup>

Having determined that the claims on which plaintiffs did not prevail were related to the claims on which they succeeded (J.A. 189), the District Court then turned to the second question posed by *Hensley*:<sup>75</sup> Whether the plaintiffs "achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." 461 U.S. at 434. In the course of this inquiry, the District Court addressed three major factors: the absolute value of the damage award, the amount of the fee award relative to the damage award, and the importance of the nonpecuniary effects of the case.

The District Court found that the absolute size of the damage award did not imply that plaintiffs' success was limited. In the opinion of the District Court, "the size of

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"Doe" defendants in 1976. Moreover, discovery from all named defendants, those police officers at the scene and those involved in the cover-up, was not only essential to the case against individual defendants but critical, in view of the standards of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), to building and successfully presenting a case against the City of Riverside.

<sup>74</sup> This case was paradigmatically, in *Hensley's* terms, a lawsuit which could not "be viewed as a series of discrete claims." 461 U.S. at 435. Not only was a common core of facts pleaded and proved, but proof of the successful claims included evidence (1) that the City of Riverside's policies and customs caused the unconstitutional deprivations, (2) that individual defendants acted with malicious intent to deprive plaintiffs of their constitutional rights — thus justifying the award of punitive damages, and (3) that defendants acted with discriminatory intent in depriving plaintiffs of their Fourteenth Amendment rights, thus leading the District Court to conclude that the unconstitutional acts were "motivated by a general hostility to the Chicano community." (J.A. 189-90).

<sup>75</sup> Amici wrongly declare that the District Court overlooked this question. (See EEAC Br. at 15-18; S.G.Br. at 15-18).

the jury award resulted from (a) the general reluctance of jurors to make large awards against police officers,<sup>76</sup> and (b) the dignified restraint which the plaintiffs exercised in describing their injuries to the jury.” (J.A. 188-89).<sup>77</sup> Taking into consideration the size of the jury award, the District Court nonetheless found that plaintiffs’ counsel achieved “excellent results” (J.A. 190) and that “the total accomplishment in this case was quite extraordinary.” (J.A. 235).

In rejecting petitioners’ argument that the fee award must be mechanically proportional to the damage award, the District Court properly followed *Hensley*.<sup>78</sup> The District Court noted several factors that legitimately contributed to the relatively large size of the fee award: the factual and legal complexity of the case (J.A. 188-89), the

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<sup>76</sup> At the second post-remand hearing, the District Court noted that “I have tried several civil rights violations cases in which police officers have figured and in the main they [police officers] prevailed because juries do not bring in verdicts against police officers very readily nor against cities.” (J.A. 235). Empirical studies confirm the District Court’s experience (see *Realities; Section 1983; Project*), and they contradict the unsupported assertions of amici. (See, e.g., Bliley Br. at 23).

<sup>77</sup> Appreciating plaintiffs’ difficult decision to underplay this aspect of their case, the District Court earlier had observed: “[O]ne of the things I liked about the trial was it seemed to me that there was no attempt to whip this up into a major confrontation between this family, the members of this family, and the police. The feelings were high enough while it was going on. If there had been — if either counsel had misbehaved during the trial in the sense that you would have whipped up the feeling, it would have been a very bad thing for the future, for their [the plaintiffs’] future in the community and for the police.” (J.A. 208).

<sup>78</sup> While generally leaving the District Court to determine the significance of the overall relief obtained in relation to the hours reasonably expended on the litigation, this Court expressly rejected the view that attorney’s fees under § 1988 should be awarded on the basis of any mathematical proportionality test — either between issues raised and issues prevailed upon, or between relief sought and relief obtained. See *Hensley*, 461 U.S. at 436 n.11.



conflicting state of the evidence (J.A. 188), the large number of defendants involved (J.A. 188), and the undesirability of and local hostility toward the case which required plaintiffs to obtain out-of-town counsel. (J.A. 189).<sup>79</sup> In accordance with *Hensley*, the District Court considered the relative size of the damage award as a relevant factor in determining the significance of overall relief, and concluded that an award of fees for all hours reasonably expended was justified. (J.A. 192).

Finally, the District Court also took into account the nonpecuniary<sup>80</sup> results achieved by this litigation.<sup>81</sup> The District Court recognized that this litigation was necessary to remedy defendants' "lawless, unconstitutional conduct," which reflected not only isolated acts against particular

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<sup>79</sup> While these factors were reflected in the original calculation of "reasonable hours," it is appropriate to reconsider them in the context of petitioners' and amici's argument for strict proportionality. For a given damage award, a reasonable fee award in a case where these complicating factors are present may be significantly higher than a reasonable fee award in a case where such factors are absent.

<sup>80</sup> Petitioners and amici misapprehend Congress' conclusion that fees awarded under § 1988 should "not be reduced because the rights involved might be nonpecuniary in nature." Senate Report at 6. They convert the words "rights involved might be nonpecuniary in nature" into something like "remedy might be solely or primarily equitable." While Congress was concerned that fees in cases resulting only in equitable relief not be reduced, the legislative history reveals that Congress also understood that in our legal system the importance of the constitutional rights vindicated does not always translate into dollar recoveries of equivalent significance. See House Report at 8. See also 122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy); 122 Cong. Rec. 31832 (1976) (remarks of Sen. Hathaway). The nonpecuniary nature of civil rights also led Congress to find that the contingent fee system for personal injury suits did not and could not work adequately to secure counsel for victims of civil rights violations. See Argument II *supra*.

<sup>81</sup> While the tendency to emphasize the dollar value of the results achieved is understandable given the cognitive prominence of hard numbers, the effort of petitioners and amici to

individuals but "general hostility to the Chicano community in the area where the incident occurred." (J.A. 190). Moreover, at the second post-remand hearing, the District Court emphasized the deterrent value of this civil lawsuit: "The institutional behavior involved here in my opinion had to be stopped and in my opinion nothing short of having a lawsuit like this would have stopped it." (J.A. 237).<sup>82</sup>

In reviewing the District Court's decision, the Court of Appeals found that the "relationship [between hours expended and overall relief obtained] is precisely what the district court focused on," and that the District Court

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(Continued from previous page)

downgrade the nonpecuniary societal benefits achieved in this and other civil rights litigation is particularly inappropriate. For example, this Court in recent years has praised the value of § 1983 damage actions in deterring Fourth Amendment violations. See, e.g., *Segura v. United States*, 104 S. Ct. 3380, 3390 (1984). Similarly, to underscore the high degree of public and symbolic value in vindicating civil rights deprivations, this Court has recognized the existence under § 1983 of claims actionable for nominal damages without proof of actual injury. See *Carey v. Piphus*, 435 U.S. 247, 266 n.24 (1978). The availability of such actions under § 1983 reflects "the importance to organized society" that certain rights be "scrupulously observed." *Id.* at 266.

<sup>82</sup> While the issuance of injunctive relief often indicates important nonpecuniary results, the absence of formal equitable relief does not imply that the success of a lawsuit is completely summed up by the damage award. In addition to its findings concerning the nonpecuniary results of this litigation, the District Court observed that unconstitutional deprivations by defendants may have "warranted an injunction." (J.A. 219). Only the imprudent breadth of an order that might read "Obey the Constitution" dissuaded plaintiffs' attorneys from pursuing this relief at the close of trial. *Id.* Moreover, Congress and this Court have rejected formalistic barriers to fee awards under § 1988. See *Maher v. Gagne*, 448 U.S. at 129 ("Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.'" (quoting Senate Report at 5)).

“found a reasonable relationship between the extent of that success and the amount of the award.” (J.A. 196).<sup>83</sup> The Court of Appeals rejected as inconsistent with congressional intent the proposition that fee awards must be mechanically proportional to damage awards, and found meritless the contention that the District Court had not reconsidered the record on remand. (J.A. 196-97). Because the District Court concisely but clearly explained proper grounds for its decision, the Court of Appeals concluded that the award of fees was well within the District Court’s discretion. (J.A. 197).

In reviewing the record and in reaching this conclusion, the Court of Appeals acted consistently with this Court’s recent decision in *Anderson v. City of Bessemer City*, 105 S. Ct. 1504 (1985). In *Anderson* this Court held that “[i]f the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.” *Id.* at 1512. Deference to the District Court’s judgment reflects both the superiority of the trial judge’s position to make findings and the District Court’s accumulated expertise in that role. *Id.*

**B. Proportionality Is Unnecessary in Light of Hensley and Other Safeguards Against Unreasonably High Fee Awards and Gouging Attorneys**

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<sup>83</sup> In confirming the District Court’s award of fees necessary to vindicate Fourth, Fifth and Fourteenth Amendment rights, the Court of Appeals fulfilled this Court’s promise in *Carey v. Phipps*, 435 U.S. at 257 n.11 (“[t]he potential liability of § 1983 defendants for attorney’s fees [under § 1988] provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore . . . [constitutional rights]”). See also *Maine v. Thiboutot*, 448 U.S. at 11 (“Congress viewed the fees authorized by § 1988 as ‘an integral part of the remedies necessary to obtain’ compliance with § 1983,” quoting Senate Report at 5).

Petitioners and amici champion proportionality to change a world where existing safeguards fail to protect against unreasonably high fee awards (“windfalls”) and avaricious attorneys. (See, e.g., P.Br. at 9, 26, 27). The image they construct for this Court, however, bears little resemblance to the actual litigation of civil rights cases. First, they understate the steps taken by Congress and this Court to insure that § 1988 would not become a “relief fund for lawyers.” *Hensley*, 461 U.S. at 446 (Brennan, J., concurring in part and dissenting in part) (citing 122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy)). Second, they ignore other existing safeguards that work in tandem with *Hensley* and that can be invoked by defendants themselves to constrain gouging and vexatious plaintiffs’ lawyers.

These safeguards are substantial. First, only prevailing plaintiffs may recover fee awards; merely litigating a bona fide claim in good faith is not sufficient. *Id.*, citing House Report at 6-8. Contrary to petitioners’ and amici’s portrayal of § 1983 cases as “low risk,” empirical studies conclude that § 1983 plaintiffs prevail far less frequently than do plaintiffs in other civil lawsuits. See Argument I *supra*. In particular, out of the seventeen § 1983 cases filed in the Central District of California in 1975 and 1976 that resulted in trials, the present case was one of only five in which plaintiffs prevailed.<sup>84</sup> Studies attribute this relatively poor success rate to jury bias against plaintiffs and for defendants (especially police officers) in civil rights cases and to judicial hostility to civil rights plaintiffs.<sup>85</sup>

Even if plaintiffs prevail, district courts have discretion to set the precise award in individual cases according

<sup>84</sup> Section 1983, 67 Cornell L. Rev. at 527-28 & n.198.

<sup>85</sup> See *Project*, 88 Yale L.J. at 808-09 (studying 149 § 1983 cases against police over a nine year period in a Connecticut district court); Section 1983, 67 Cornell L. Rev. at 539.

to standards that were tested by courts before § 1988's passage, scrutinized by Congress to insure that competent attorneys would be attracted but not overpaid, and carefully elaborated by the Court in *Hensley* and *Blum* to achieve the delicate balance Congress sought. Moreover, Congress and the Court permit district courts to deny fees entirely in special circumstances when an award would be unjust — even if the plaintiff prevails. *Hensley*, 461 U.S. at 429, citing Senate Report at 4. Still, petitioners and amici insist that the world created by Congress and this Court in *Hensley* invites undeterrable abuse by greedy plaintiffs' attorneys. (See, e.g., P.Br. at 26-28; EEAC Br. at 21; Bliley Br. at 8).

Petitioners' and amici's speculation also ignores the existence of still other safeguards against avaricious overlitigation. Both Congress and this Court have reaffirmed that attorney's fees can be awarded against plaintiffs who litigate frivolous or vexatious claims. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. at 416-17; *Hughes v. Rowe*, 449 U.S. 5, 14-16 (1980) (per curiam); House Report at 6-7 (1976). Moreover, the 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure makes severe sanctions (including attorney's fees) more readily available for precisely the abuses petitioners and amici describe as currently undeterrable. See Rule 11, Fed. R. Civ. P.<sup>86</sup>

Finally, petitioners and amici conveniently ignore the availability of Rule 68 as a safeguard against mercenary

<sup>86</sup> A recent empirical study finds that, in less than two years after Rule 11 was amended, at least 159 opinions were published concerning sanctions, with attorney's fees granted as sanctions in 65 of those cases. Kassin, *An Empirical Study of Sanctions Under Rule 11* (forthcoming Stan. L. Rev. (1986)). The study finds, on the basis of an extensive questionnaire and survey of 259 federal district judges, that there is a heightened awareness of Rule 11's new requirements. *Id.* See also Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985).



attorneys in cases governed by § 1988. Rule 68 provides that if a timely pretrial offer of settlement is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." In *Marek v. Chesney*, 105 S. Ct. 3012 (1985), this Court held that the term "costs" in Rule 68 includes attorney's fees awardable under § 1988: "Application of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer." *Id.* at 3017. Since Rule 68 places no limits on the number of settlement offers that can be made at any time more than 10 days before the trial begins, defendants already have available to them a highly refined and effective means of deterring the greedy lawyers petitioners and amici so fear.

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### CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully submitted,

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January 1986

**APPENDIX**

TABLE 1

§ 1983 FILINGS IN THE  
CENTRAL DISTRICT OF CALIFORNIA

| Year                       | Nonprisoner<br>§ 1983 Cases Filed<br>Per Judgeship | Total § 1983<br>Cases Filed<br>Per Judgeship | Total § 1983<br>Cases As<br>Percentage of All<br>Civil Cases Filed |
|----------------------------|----------------------------------------------------|----------------------------------------------|--------------------------------------------------------------------|
| 1975 <sup>1</sup>          | 8.75                                               | 16.5                                         | 5.56% <sup>2</sup>                                                 |
| 1976 <sup>3</sup>          | 8.5                                                | 13.9                                         | 5.56%                                                              |
| 1980-<br>1981 <sup>4</sup> | 10.6                                               | 14.2                                         | 3.80%                                                              |

Sources: Eisenberg & Schwab, *The Realities of Constitutional Tort Litigation* at 16, 19 (1986) (study presented at Association of American Law Schools 1986 Annual Conference) (copy lodged with the Clerk of the Court); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 531 (1982).

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<sup>1</sup> Figures are for the calendar year 1975.

<sup>2</sup> This figure is a combined percentage for the years 1975 and 1976.

<sup>3</sup> Figures are for the calendar year 1976.

<sup>4</sup> Figures are for the fiscal year 1980-1981, and include cases combining § 1983 and Title VII claims as well as "pure" § 1983 cases.



TABLE 2

CHARACTERISTICS OF  
NONPRISONER § 1983 CASES IN THE  
CENTRAL DISTRICT OF CALIFORNIA

| Year                       | Number<br>of<br>Cases<br>Filed | Cases<br>Result-<br>ing in<br>Trials | Cases<br>with<br>Answers<br>Filed | Cases<br>with<br>Hearings<br>Held | Cases<br>with<br>Depos.<br>Taken | Cases<br>with<br>Interrogs.<br>Served | Median<br>Time to<br>Dispo-<br>sition |
|----------------------------|--------------------------------|--------------------------------------|-----------------------------------|-----------------------------------|----------------------------------|---------------------------------------|---------------------------------------|
| 1975 <sup>1</sup>          | 140                            | 7                                    | 76                                | 39                                | 30                               | 51                                    | 7.0 mo                                |
| 1976 <sup>2</sup>          | 136                            | 10                                   | 69                                | 37                                | 26                               | 41                                    | 10.0 mo.                              |
| 1980-<br>1981 <sup>3</sup> | 178                            | 18                                   | 115                               | 101                               | 101                              | 57                                    | 11.6 mo.                              |

Sources: Eisenberg & Schwab, *The Realities of Constitutional Tort Litigation* at Tables II and III (1986) (study presented at Association of American Law Schools 1986 Annual Conference) (copy lodged with the Clerk of the Court); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 526-27 (1982).

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<sup>1</sup> Figures are for the calendar year 1975.

<sup>2</sup> Figures are for the calendar year 1976.

<sup>3</sup> Figures are for the fiscal year 1980-1981, and include cases combining § 1983 and Title VII claims as well as "pure" § 1983 cases.

MAR 6 1986

JOSEPH F. SPANIOLO, JR.  
CLERK

No. 85-224

In The  
**Supreme Court of the United States**  
October Term, 1985

CITY OF RIVERSIDE, LINFORD L. RICHARDSON,  
MICHAEL S. WATTS, DAN PETERS, GERALD MIL-  
LER, and ROBERT PLAIT,

*Petitioners,*

vs.

SANTOS RIVERA, JENNIE RIVERA, DONALD RI-  
VERA, JEROME RIVERA, LEE ROY RIVERA, MARK  
LARABEE, ENRIQUE FLORES, AND MANUEL  
FLORES, JR.,

*Respondents.*

**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**REPLY BRIEF OF PETITIONERS**

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## **QUESTIONS PRESENTED**

### **1.**

Whether "a reasonable attorney's fee" awarded under Section 1988 of Title 42 of the United States Code must bear some proportionality to the amount of the judgment obtained by the party seeking such fees in a case in which monetary relief only was pursued and/or obtained.

### **2.**

Whether an award of attorney's fees under Section 1988 of Title 42 of the United States Code more than seven times the amount of a judgment obtained in a suit for monetary relief only constitutes an abuse of discretion by the trial court.

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## **ARGUMENT**

### **I. Petitioners Do Not Now, And Have Never Urged, The Adoption Of A Blanket Rule Of "Mechanical Proportionality" In Awarding Attorney's Fees Under § 1988. Rather, Petitioners Urge That Such Awards Follow The Clear Language Of § 1988 Which Provides That Only "Reasonable" Fees Be Awarded Thereunder**

Much of the Brief of Respondents (R.B.) is spent in an attempt to convince this Court that Petitioners urge some kind of blanket "mechanical proportionality" standard be adopted in the awarding of attorney's fees under 42 U.S.C. § 1988, followed by reasons why such a standard is not compelled by § 1988 (R.B. 19, 21). Such posturing not only is cleverly calculated to focus this Court's attention away from the real issues herein, but also pointedly ignores the fact that Petitioners have never proposed, or even inferred, the adoption of such a mechanistic test in all cases. To so argue would be to deny the myriad of differences which exist in the types of cases which can be, and are brought by civil rights litigants under the various civil rights statutes (42 U.S.C. 1981, 1982, 1983, 1985, and 1986) as well as the equally diverse types of relief which may be obtained thereunder.

Rather, what Petitioners have long argued that § 1988 compels—both in its legislative history, and particularly, by its own clear language—is that there must be some relationship between any attorney's fees awarded under that statute and the results obtained by any litigation brought under the civil rights umbrella. It is this relationship between the results obtained and the fees awarded which is at the heart of this matter, and nothing else.



That such a relationship was of paramount concern to Congress is clear from the wording which that body chose in adopting § 1988, providing, in the appropriate instances, that a trial court may award a "reasonable" attorney's fee. Thus, the focus of this case, and, as this Court has recognized in its previous decisions, the focus of nearly every other case in which the implementation of § 1988 has been reviewed, almost always turns on the meaning of the word "reasonable" when viewed against the conduct of a trial court in awarding attorney's fees.

Obviously, "reasonable" is not a legal term of art, but, rather, is a word of common and general usage. It has no esoteric definitions, no hidden meanings.<sup>1</sup> It is a word easily understood by the average man, and so too should be easily understood by district court judges, although in far too many situations, that is not always true. One thing is clear, however, and that is that the definition of "reasonable" is precise enough that it cannot be used to describe conduct which is irrational, which is not based upon the exercise of sound judgment, or which is excessive.

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<sup>1</sup> *The living Encyclopedic Dictionary of the English Language*, published by the English Language Institute of America, Chicago (1977), defines "reasonable" as follows: "agreeable to reason or sound judgment, as a reasonable supposition; rational; having or exercising sound judgment; not exceeding the limit prescribed by reason, or not excessive; moderate, as charges or prices."

*Roget's International Thesaurus*, published by Thomas Y. Crowell Company, New York, lists the following synonyms for "reasonable": "moderate, logical, plausible, credible, intelligent, wise, sane, inexpensive, vindicable, and justifiable."

In other words, a "reasonable" attorney's fee cannot, by definition, if not by law, be one which, *as herein*:

(1) exceeds by seven times the amount awarded by a jury in a case in which only money damages are awarded;

(2) is made without the benefit of detailed, contemporaneously-kept time records;

(3) is awarded for all time expended, when success is achieved on a small percentage of the claims pursued, and against fewer than 20% of the defendants litigated against;

(4) achieves no societal benefit, beyond the pecuniary award to the individual litigators;

(5) results from an on-the record refusal of a trial court to follow the remand instructions of this Court following the reversal of a previous award of attorney's fees (J.A. 225; 230).

Indeed, nothing this Court has done or said to date in reviewing cases arising under § 1988 has departed in any way from a recognition by it that for an attorney's fee to withstand scrutiny under that statute, it must, by definition, be reasonable.

As an example, in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), this Court noted that merely finding that the extent of relief obtained by a prevailing party clearly justifies an award of attorney's fees under § 1988 does not end the trial court's inquiry, since:

A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.

*Hensley*, *supra*, 461 U.S. at 440, 103 S.Ct. at 1943

The logic behind such a statement is clear enough—any other result would not follow Congress' dictates that only a "reasonable" attorney's fee be awarded under § 1988. As Justice Powell clearly stated:

. . . [w]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

*Hensley, supra*, 461 U.S. at 440, 103 S.Ct. at 1943

Although Respondents do not charge that this Court was urging the adoption of a standard of "mechanical proportionality" by setting forth that for an award of attorney's fees to be reasonable, there must be some "relation" between the sums awarded and the results obtained in the underlying litigation, what Justice Powell stated in the above quoted passage is exactly the position taken by the Petitioners herein. For obvious reasons, Respondents would have this Court believe otherwise.

Likewise, *Hensley* clearly stands for the proposition—also advocated by Petitioners herein—that for a "reasonable" attorney's fee to be awarded, "there must be detailed records of time and services for which the fees are sought" (*Hensley, supra*, 461 U.S. at 440, 103 S.Ct. at 1943)

As Chief Justice Burger stated in his concurring opinion therein:

. . . [t]he party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended. . ."

— *Hensley, supra*, 461 U.S. at 441, 103 S.Ct. at 1943

The rationale behind such a statement is clear: to award attorney's fees absent the type of billing records which could normally be expected in any attorney-client context, given human temptation, not only would not be reasonable, but, moreover, could lead to the awarding of the very type of windfall fees which Congress claimed was not the intent of § 1988. H.R. Rep. No. 94-1558, p. 9 (1976); S.Rep. No. 94-1011, p. 6 (1976). Indeed, because § 1988 allows easy access to the fee purse, i.e., a party bringing a claim thereunder only has to prevail on one claim against one defendant in order to be adjudged a "prevailing party," implementation of the intent of the statute, as well as by its own words, relies on reasonableness in order to meet the twin goals of providing access to meritorious claims, while preventing windfalls to those with claims lacking significant merit.

And while providing access for meritorious civil rights claims is the reason often given for the enactment of § 1988, it does not follow therefrom that it was ever the intent of Congress to chill good faith defenses of such claims as a result. Clearly, there is nothing in the legislative history herein to indicate that what Congress had in mind was the forcing or extorting of settlements for fear that losing only one of the many claims filed by a civil rights plaintiff might open wide the coffers of this nation's state and local governments for all time spent on "related," thought totally unsuccessful claims, especially cases involving non-representative claims which culminate in awards of monetary damages only. Such a result not only would encourage the churning of marginal cases, but also, could not result in attorney's fees which are "reasonable."

The inciting of litigation must be distinguished from the providing of court access, and yet, the award of attorney's fees in this matter achieves only the former at the expense of the latter. It also continues the apparent belief among some sectors of the bar that § 1988 has become an end, rather than a means to an end. The lineup of amici supporting Respondents' position well illustrates this point, since, with the exception of the NAACP Legal Defense and Education Fund (which, itself relies heavily on the availability of a pool of volunteer attorneys), all of them are representatives of attorneys who *themselves* would benefit the most from the overexpansive interpretation of § 1988 reflected by the trial court's award of fees below.

In sum, it hardly seems that the societal interest of having *all* civil rights actions in our courts is so compelling that it justifies ignoring the real value or merit of each case, principally to insure the existence of a cadre of attorneys ready to handle all such cases as they arise. Rather, it is clear that the value or merit of each case to society as a whole must be examined by a district court before a "reasonable" attorney's fee may be awarded under § 1988, and that this examination must balance the amount of legal work done with the results obtained by such work before any such attorney's fee may be awarded. In cases which conclude in obvious societal benefits, such as those cited throughout the briefs of Respondents and their amici (R.B. 35; Brief of Washington Council of Lawyers, et al, p. 11), the value of encouraging court access through awards of attorney's fees based on verifiable market rates for all time necessary to achieve such results seems a sound one.



On the other hand, herein there was no societal benefit achieved other than that which deters future wrongful conduct by *any* potential defendant after *any* litigation of *any* type ending in a plaintiff's judgment. True, Respondents vindicated *their* civil rights, and true, this vindication does have value—as set by the jury it was \$33,350. Respondents' arrogant protestations notwithstanding (R.B. 33, fn. 59), it simply defies belief that there do not exist within the private bar many attorneys who would not leap at the opportunity of recovering the equivalent of the normal free-market negotiated contingency fee for such litigation. This would mean that herein, such counsel could have expected to receive court-ordered attorney's fees, payable by the losing side and not out of his or her client's share of the judgment, of from \$11,116 to \$13,340 for success of the magnitude of that achieved by Respondents' counsel herein, based on a percentage (or proportion) of the results obtained of from 33 $\frac{1}{3}$  to 40% of the total judgment.

Obviously, such a result would not allow civil rights attorneys to litigate to their hearts' content, on theories without merit, and against parties without liability, secure in the knowledge that they would be fully recompensed thereafter, as long as they achieved prevailing party status, and that their time was, somehow "related" to their so doing. But such a fee and such a result would be "reasonable," and would, therefore, comport with the language of § 1988, as enacted by Congress.

**II. Respondents Are Attempting To Justify The Award Of Attorney's Fees Herein On The Case Which They Lost, Recognizing That Such An Award In The Case Which They Won Would Not Be Reasonable**

The Brief for Respondents is little more than an attempt to justify the unjustifiable award of attorney's fees herein by arguing that such an award was reasonable, based not on what Respondents proved through their litigation and at trial. but, rather, what they wished they had proved, had the facts been otherwise. Further, they have proceeded on this course without informing this Honorable Court of this discrepancy.

As such, the Statement of Facts contained in Respondents' Brief largely is not a statement of facts at all. Therein, Respondents seek to retry this case before ~~this~~ Honorable Court by attempting to place into the record at this late date that which the jury below considered and rejected, and that which was never in the record at all. Their purported Statement of Facts is nothing more than a rewrite of their opening argument at trial, combined with what was placed before the jury and largely disbelieved by that same trier of fact. It is based in great part on out-of-context snippets from their own depositions (which are, in practically every instance, refuted by other depositions and testimony which they chose not to mention), documents not contained in the *Joint Appendix* to which they stipulated, and documents previously unmentioned or unreported, either before trial, during trial, after trial, or at all (e.g., the *Riverside Press* story mentioned for the first time at R. B. 10, fn. 13). Indeed, a comparison between Respondents' Statement of Facts herein, and



the quite dissimilar Statements of Facts/Statements of the Case(s) which they have adopted in previous briefs during the long life of this litigation, reflects the abject desperation faced by attorneys trying to justify the unjustifiable—an award of attorney's fees seven times the amount received by their clients in a case in which money damages only were awarded, and these damages, against fewer than 20% of the defendants against whom they chose to litigate.

Unfortunately, space does not permit Petitioners to point out all the discrepancies between the facts, as reflected by the record herein, and those things on which the record is silent (or quite different), but which are contained in Respondents' Statement of Facts nevertheless. However, so that this Court may at least get the flavor of what is being attempted by Respondents so as to make their case seem to be something that it clearly is not, a few examples are in order:

(a) Respondents spend nearly four pages on their brief (R.B. 10-13) trying to *prove* that Petitioners were engaged in a "cover-up" of the events which gave rise to the instant lawsuit. Much of their argument which follows is based upon this purported "cover-up." Indeed, this is not the first time Respondents have attempted such a scenario, but thus far herein, they have never been successful in getting anyone to believe it. Indeed, it was because of this asserted cover-up that counsel for Respondents justified their refusal to dismiss from this action most of the officers against whom they proceeded to trial, including the Riverside Chief of Police, Fred Ferguson. However, no cover-up was ever proven, and the jury found no liability as to *any* of the police officers sued by Re-

spondents on the basis of a cover-up alone, although the trial court did award attorney's fees to Respondents for such needless and unmeritorious litigation.

If such a cover-up had taken place, and was proven, such would be the very type of conduct which could have justified, in some measure at least, a significant award of attorney's fees. Hence, any cover-up by the Riverside Police of their own misconduct would have been an integral part of Respondents' case, and could be expected to have been highlighted by Respondents (and by the courts which made and subsequently reviewed the award of attorney's fees) wherever possible. And yet, there was *no mention* by the trial court which made the fee award herein of any cover-up, either in its initial set of Findings of Fact and Conclusions of Law (J.A. 173-175) or in its second set of Findings of Fact and Conclusions of Law (J.A. 187-192), both of which were prepared for the trial court *by Respondent's attorneys* (J.A. 222; 239-240). Neither is there any mention of a cover-up in the two opinions written by the Ninth Circuit herein (J.A. 176-183, *Rivera v. City of Riverside*, 679 F.2d 795 (9th Cir. 1983); J.A. 193-198).

Relying upon (and emphasizing) an unproven cover-up at this late date in order to demonstrate some justification for the outrageous award of attorney's fees herein speaks eloquently of Respondents' reluctance to accept the facts in this matter as they actually transpired, and as are duly reflected by the record below, not to mention the verdict of the triers of fact—the jury.

(b) Likewise, the trial court had no evidence before it of any kind from any of the *Respondents*, that any of

them had searched at length (or at all) for local counsel to represent them before engaging then-San Diego located counsel, Messrs. Lopez and Cazares. Still, both the Respondents and one of their amici (Brief of NAACP Legal Defense and Educational Fund, Inc., page 15) so contend, apparently in an attempt to convince this Court of how unpopular this suit was, and therefore, of how much adversity Respondents and their counsel had to surmount in order to win anything at trial.

But the facts are otherwise. First, the case was not tried locally, but in Los Angeles, more than sixty miles and another county removed from Riverside. There could not be, and was not, any local hostility in such a venue. Secondly, and even more important, since the undesirability of a case is one of the twelve *Johnson v. Georgia Highway Express, Inc.* (488 F.2d 714, 719 (5th Cir. 1974)) factors to be considered by a trial court before awarding attorney's fees under § 1988, and hence, an important "fact" if such was the case, one would expect such a "fact" to have been included by way of affidavit from one or more of the *Respondents* in any fee petition on behalf of any of the attorneys so affected. However, a review of the fee petition of Respondents herein (J.A. 16-64) discloses that there is not one word from *any* of the Respondents regarding their supposed difficulty in obtaining local counsel to represent their "unpopular" cause. The absence of this undesirability factor was duly noted by Petitioners in opposing Respondents' request for attorney's fees (J.A. 86-88). Thus, it was not at all surprising that thereafter, appearing in the trial court's Findings of Fact (J.A. 173; 189) was the wholly unsupported statement that "Given

the nature of this lawsuit, many attorneys within the community would have been reluctant to institute this action.”

Such a statement could not have been based on anything available to the trial court for its review. Still, as noted above, it was not surprising that such a statement appeared as a Finding of Fact, since, as also previously stated herein, the trial court’s Findings were prepared, at its request, by the fee petitioners themselves (J.A. 222, 239-240). Of course, absent any evidence on the subject, this is not something of which a trial judge could be expected to take judicial notice, the events which formed the basis of the lawsuit and trial over which the district court presided, being separated by many miles and many years.

Indeed, much of the Respondents’ Statement of Facts, and subsequent Argument, relies heavily on the trial court’s comments and predispositions, rather than on the jury results. Not only is this bootstrapping at its worst, but it clearly points to the discrepancy between what the jury determined and what the trial court would have preferred that the jury had determined. However, the district judge was not the trier of fact herein, the jury was. And it is clear from what the jury found that the district court’s account of the evidence—often aided, with its consent and at its request, by self-serving input from Respondents’ counsel—is not plausible in light of the record reviewed in its entirety.

(c) Even Respondents’ Introduction to its Statement of the Case is not spared their revisionist historical approach to what has transpired herein.

In what can only be described as an attempt to play fast and loose with reality, Respondents state that Petitioners have not challenged as "clearly erroneous" the trial judge's Findings of Fact with respect to (1) the prevailing market rate for similar services and (2) its finding that there were no facts which would justify a failure to compensate Respondents' counsel for the full value of the services which they performed herein (R.B. 2-3). Such grammatical hocus pocus highlights to what lengths Respondents apparently feel the need to go in order to re-write this case into something it is not.

While it is true that Petitioners have never used the phrase "clearly erroneous" in challenging the above findings made by the trial court, nor have they ever specifically referred to *FRCP 52(a)* in making such a challenge, the record herein could not be more clear that these two findings (as well as many others) have been specifically challenged by the Petitioners at every stage of the proceedings herein, trial and appellate (J.A. 76-101; 161-163; see also Appellant's Reply Brief filed in the Ninth Circuit in June, 1981, in case number 81-5362, *Rivera v. City of Riverside*, *supra*, pp. 15-18). To state otherwise, as Respondents have in their Statement of the Case, would be to deny the existence of Petitioners' briefs and petitions filed previously over a period of more than five years. While one can understand why Respondents might wish to do so, to represent that such is the true state of affairs when clearly it is not, is inexcusable.

Moreover, the facts which underlie this matter, and as proven at trial, make the resulting award of attorney's fees to Respondents herein unique in the annals of civil rights litigation—at least with respect to the amount of



such fees when measured against the societal gains won by Respondents as a result of bringing their action. It is this reality alone which explains why Respondents have attempted throughout their Brief to justify the award of attorney's fees under review by attempting to "tack on" the results of their case with the results of other cases in which the facts were markedly different, so as to gain credibility thereby. However, in every instance where this ploy is tried, this factual dissimilarity is apparent. It is equally apparent that because this is so, that the award of attorney's fees herein was unreasonable, both under a fair reading of *Hensley, supra*, and under any reading of § 1988.

At times (R.B. 35) Respondents appear to be arguing that because the award of damages herein was relatively low, that their fee award should be supported by treating their case as if it were one in which no monetary relief was sought, and which broadly vindicated the rights of others. This strategy is a naked attempt to compare this case favorably with the many decisions in which it has been said that there need not be monetary damages to entitle attorneys to awards of significant attorney's fees (*Davis v. County of Los Angeles*, 8 E.P.D. ¶9444 (C.D. Cal. 1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975); and *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd* 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978); B.R. 35).

However, the facts of the instant matter are quite different from those cases for which Respondents seek a favorable comparison. Here there was no issuance of declaratory or injunctive relief—and it serves Respondents not

to reflect that the trial court might have issued injunctive relief if only their counsel had asked for it after trial (R.B. 17, fn. 21), since, as Respondents' counsel have admitted, framing such relief would have been difficult, if not impossible (J.A. 219). Rather, at the trial herein non-pecuniary rights were never placed in issue by the Respondents, and the jury found all that Respondents asked of them by way of relief—monetary damages.

Likewise, it does not follow logically (R.B. 45) that because Respondents received a small amount of money damages that nonpecuniary results were also achieved by them. This case simply was not worth very much in money damages, and the jury found no basis for, and the trial court awarded, no other relief. The rights of none other than the eight Respondents were vindicated as a result of this litigation. No class was represented herein, counsels' after-the-fact attempts at such a characterization notwithstanding (R.B. 38, fn. 65). And as has been pointed out earlier in Petitioners' Brief on the Merits (P.B. 4), and as previously recognized herein by Justice Rehnquist (*City of Riverside v. Rivera*, — U.S. —, —, 106 S.Ct. 5, 6 (1985)), the City of Riverside was not compelled to, and did not change any of its practices or policies as a result of this suit. In sum, while Respondents benefited to the tune of \$33,350 (of which \$13,300 was attributable to Respondents' civil rights claims), and while their counsel stand to benefit in an amount more than seven times that sum (\$245,456.25) should the award of attorney's fees below be upheld, society has not and will not benefit one whit from what was nothing more than a personal action for damages brought on behalf of eight individuals.

The conclusion regarding the lack of societal benefit gained in the bringing of this action is also compelled by



the basic inconsistency in Respondents' attempts to justify the district court's fee award. First, they paint a picture of the factual underpinnings of this lawsuit which, if true, would make this case just short of the outrage of the century (R.B. 5-13). Even if partially true, such a set of occurrences would have made this case a sure winner—a rich plum for any attorneys lucky enough to be retained to handle it—even given the rate of success of civil rights cases filed in the Central District of California (R.B. 27-28). It is clear, therefore, that if Respondents' Statement of Facts is accepted as true, that the vindication of their civil rights should have resulted in a large award of damages, assuming that a jury would view the "facts" as Respondents did, and be equally outraged as well.

Then, in a markedly different approach (R.B. 43-45), Respondents' counsel take the position that their performance was so heroic in obtaining even a \$33,350 jury award for their clients, that they are entitled to attorney's fees seven times that amount as a result. This logic is based on a "new" set of facts, grounded on the premise that since this case was so difficult and so complex it required a high degree of litigation excellence to prevail *at all*.

The fallacy with such "logic" is that the instant case must fit one, or none, of these two diametrically opposed scenarios. It cannot fit both.

If this matter really arose out of such an egregious factual context—and constituted such a gross violation of the civil rights of the Respondents—it is inconceivable that the jury below wouldn't have awarded a larger sum of damages, assuming competent lawyering.

On the other hand, if counsels' professional work was so heroic, the only conclusion that can result therefrom is that the facts giving rise to this suit weren't so outrageous after all, and hence, that there really was no societal benefit to this litigation, over and above that received by the individuals involved.

The only other explanation offered by Respondents for the small amount of damages awarded by the jury—an explanation concurred in by the district court (J.A. 188-189)—was “the general reluctance of jurors to make large awards against police officers” (R.B. 44), a reluctance apparently not shared by the jurors in *Roman v. City of Richmond*, 570 F.Supp. 1544 (N.D. Cal. 1983) (\$3,000,000); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) (\$1,590,670); *Estate of Davis v. Hazen*, 582 F.Supp. 938 (C.D. Ill. 1983) (\$575,000); *Herrera v. Valentine*, 563 F.2d 1220 (8th Cir. 1981) (\$300,000); *Smith v. Heath*, 517 F. Supp. 774 (D. Tenn. 1980), *aff'd* 691 F.2d 220 (6th Cir. 1981) (\$132,000); *Spears v. Conlish*, 440 F.Supp. 490 (N.D. Ill. 1977) (\$100,000 assessed against a single police officer); *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir. 1982), *cert. den.* 459 U.S. 1171 (1983) (\$100,000); *Stokes v. Delcambre*, 710 F.2d 1120 (5th Cir. 1983) (\$310,000 in punitive damages against a local sheriff and deputy), and in numerous other cases as well.

Once again, the facts as represented by reality, on the one hand, and the “facts” as used both by the district court and Respondents to justify the unjustifiable, on the other, are wildly different. Fortunately, the truth, as measured by the record herein, is not that difficult to ascertain.

### CONCLUSION

For the foregoing reasons, Petitioners urge that the language of and legislative intent behind § 1988 compel a ruling by this Court that where there are no specific, verifiable societal benefits resulting from an action to enforce civil rights, any award of attorney's fees thereafter must be reasonably related to the amount of the pecuniary damages recovered by a plaintiff, where pecuniary damages are the only relief obtained therein. Since the within action clearly falls within such a definition, Petitioners pray that the judgment awarding attorneys' fees by the trial court below be reversed and the matter remanded for further proceedings consistent with such a ruling.

Respectfully submitted,

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(4)  
No. 85-224

Supreme Court, U.S.

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CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

CITY OF RIVERSIDE, ET AL,

*Petitioners,*

v.

SANTOS RIVERA, ET AL.

*Respondents.*

**BRIEF AMICI CURIAE OF  
AMERICANS FOR EFFECTIVE LAW  
ENFORCEMENT, INC.  
JOINED BY  
THE NATIONAL DISTRICT ATTORNEYS  
ASSOCIATION, INC.,  
THE INTERNATIONAL ASSOCIATION OF  
CHIEFS OF POLICE, INC.,  
AND THE  
LEGAL FOUNDATION OF AMERICA,  
IN SUPPORT OF THE PETITIONERS**

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IN THE  
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CITY OF RIVERSIDE, ET AL,

*Petitioners,*

v.

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**BRIEF AMICI CURIAE OF  
AMERICANS FOR EFFECTIVE LAW  
ENFORCEMENT, INC.  
JOINED BY  
THE NATIONAL DISTRICT ATTORNEYS  
ASSOCIATION, INC.,  
THE INTERNATIONAL ASSOCIATION OF  
CHIEFS OF POLICE, INC.,  
AND THE  
LEGAL FOUNDATION OF AMERICA,  
IN SUPPORT OF THE PETITIONERS**

---

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Jonathan Kotler, Esq., Counsel for Petitioners, and Gerald P. Lopez, Esq., Counsel for Respondents. Letters of Consent of both parties have been filed with the Clerk of this Court.

## INTEREST OF AMICI

**Americans for Effective Law Enforcement, Inc. (AELE)**, as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

**AELE** has previously appeared as *amicus curiae* over sixty times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

**The National District Attorneys Association, Inc. (NDAA)** is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

**The International Association of Chiefs of Police, Inc. (IACP)**, is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

**The Legal Foundation of America (LFA)** is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in

this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

*Amici* are professional associations representing the interests of law enforcement agencies and their municipalities at the state and local level. Our members include (1) law enforcement administrators who are frequently the target, in their personal and official capacity, of lawsuits brought under 42 U.S.C. Section 1983, and the award of counsel fees under 42 U.S.C. Section 1988; and (2) prosecutors, county counsel and police legal advisors who, in their civil capacity, are called upon to defend such suits against law enforcement administrators, law enforcement agencies, and their employing county or municipal government.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of rulings such as that of the court below, *Rivera v. City of Riverside*, 679 F.2d 795 (9th Cir. 1982), and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

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CITY OF RIVERSIDE,  
LINFORD L. RICHARDSON, MICHAEL S. WATTS,  
DAN PETERS, GERALD MILLER, and ROBERT PLAIT,  
*Petitioners,*  
v.

SANTOS RIVERA, JENNIE RIVERA,  
DONALD RIVERA, JEROME RIVERA, LEE ROY RIVERA,  
MARK LARABEE, ENRIQUE FLORES, and  
MANUAL FLORES, JR.,  
*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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**BRIEF AMICUS CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL  
IN SUPPORT OF THE PETITIONERS**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

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No. 85-224

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CITY OF RIVERSIDE,  
LINFORD L. RICHARDSON, MICHAEL S. WATTS,  
DAN PETERS, GERALD MILLER, and ROBERT PLAIT,  
*Petitioners,*

v.

SANTOS RIVERA, JENNIE RIVERA,  
DONALD RIVERA, JEROME RIVERA, LEE ROY RIVERA,  
MARK LARABEE, ENRIQUE FLORES, and  
MANUAL FLORES, JR.,  
*Respondents.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit**

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**BRIEF AMICUS CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL  
IN SUPPORT OF THE PETITIONERS**

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The Equal Employment Advisory Council respectfully submits this brief as amicus curiae with the consent of the parties. Statements of Consent have been submitted to the Clerk of the Court. This brief urges that the decision of the Ninth Circuit Court of Appeals be reversed, and thus supports the position of the Petitioners.

## INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC or Council) is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations which themselves have hundreds of employer members with a common interest in the foregoing purposes. The Council's governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO). Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of the Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The issue before the Court in this case involves the proper interpretation of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. One of the statutes covered by Section 1988 is 42 U.S.C. § 1981, which often is used as a basis for lawsuits challenging employment practices. Moreover, the fee-shifting provisions of Section 1988 and of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), contain virtually the same language and have been given similar interpretations by the courts. The manner in which the Court interprets Section 1988 in the instant case, therefore, will have an important impact on the availability and scope of attorney's fee awards in employment discrimination litigation. Because substantially all of EEAC's members, or their constituents, are subject to the attorney's fees provisions of both Section 1988

and Title VII, those members have a direct interest in the outcome of this case.

Motivated by its concern for how Section 1988 and similar attorney's fee provisions are interpreted, EEAC has filed amicus curiae briefs in this Court in *Evans v. Jeff D.*, No. 84-1288 (concerning the simultaneous negotiation of attorney's fees and the merits in civil rights class actions); *Marek v. Chesny*, 105 S. Ct. 3012 (1985) (concerning the interplay between Section 1988 and Fed. R. Civ. P. 68); *Webb v. Board of Education of Dyer County*, 105 S. Ct. 1923 (1985) (concerning whether Section 1988 authorizes the recovery of attorney's fees incurred in optional state administrative proceedings); *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (concerning whether a partially successful plaintiff may recover attorney's fees under Section 1988 for legal services on unsuccessful claims); and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (concerning the proper standard to be used in deciding whether to award attorney's fees to a successful defendant in a Title VII action). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. See, e.g., *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

### STATEMENT OF THE CASE

The question presented by this case is whether the amount of attorney's fees awarded to respondents is sufficiently related to their limited success in the underlying lawsuit to be "reasonable" within the meaning of 42 U.S.C. § 1988. The issue arises from an action filed by respondents against the City of Riverside, its police chief, and 30 police officers, alleging that the police committed various civil rights violations and other torts in handling



a disturbance in a predominantly Latino section of Riverside.<sup>1</sup> To redress the alleged violations, respondents sought both monetary damages and injunctive and declaratory relief. In addition, they sought the attorney's fees that are the subject of the instant case.

Before the case went to trial, respondents abandoned their original claim that the police officers had acted with discriminatory intent and they dropped their request for declaratory and injunctive relief. Also before trial, 17 of the individual defendants were dismissed on motions for summary judgment. The jury exonerated another 9 of the defendants at the close of the trial, finding only 6 (the City and 5 individuals, hereinafter "petitioners") of the original 32 defendants liable. Of the 19 original substantive claims, the jury found only 3 to be meritorious—the claim alleging a § 1983 violation, and the claims alleging negligence and false arrest and imprisonment. Although the jury awarded \$33,350 in individual damages, respondents obtained no other monetary or injunctive relief, and no changes in police policy resulted from the litigation.

After the trial, respondents filed a motion requesting attorney's fees in the amount of \$245,456.25, which the trial court granted in full. See *Petition for Writ of Certiorari* (hereinafter *Pet. Cert.*), Appendix 6. The Court of Appeals for the Ninth Circuit affirmed the award of attorney's fees, *Rivera v. City of Riverside*, 679 F.2d 795 (9th Cir. 1982), and petitioners sought review in this Court. This Court granted the petition for certiorari, vacated the fee award, and remanded for re-

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<sup>1</sup> Specifically, the suit alleged violations of the First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution, violations of 42 U.S.C. §§ 1981, 1983, 1985(3), and 1986, and pendant state claims for conspiracy, emotional distress, assault and battery, bodily injury, property damage, breaking and entering a residence, malicious prosecution, defamation, false arrest and imprisonment, lost wages, and negligence.

consideration in light of *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *City of Riverside v. Rivera*, 461 U.S. 952 (1983).

The district court on remand reinstituted its prior ruling, again granting the full \$245,456.25 in requested fees. See Pet. Cert., Appendix 2. The court found that on the "central and most important issue" of "whether there was police misconduct committed by and condoned by defendants," respondents had prevailed. *Id.* at 2-6. Moreover, the court found, all of respondents' original claims were "closely related," so that "time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail." *Id.* at 2-6 - 2-7. The court therefore concluded that "the total number of hours expended by counsel" was a proper basis for determining the fee award and that the full amount requested was "justified in light of the substantial success achieved." *Id.* at 2-12.

On appeal, the Ninth Circuit again affirmed the \$245,456.25 fee award, this time in an unreported opinion. See Pet. Cert., Appendix 1. The circuit court agreed that respondents had "succeeded on the most significant issue of the litigation," *id.* at 1-4, and that the respondents' attorneys "spent no time on claims unrelated to the successful claims." *Id.* at 1-6. The court therefore upheld the district court's conclusion that there was "a reasonable relationship" between the degree of success obtained and the amount of the fee award. *Id.* at 1-7. Finally, the court of appeals rejected "the proposition that there need be a relationship between the amount of damages awarded to the prevailing party and the amount of attorney's fees awarded." *Id.* at 1-8 - 1-9.

With the full fee award still in place, petitioners again sought review in this Court and a writ of certiorari was granted. *City of Riverside v. Rivera*, 106 S.Ct. 244 (1985). In addition, Justice Rehnquist granted petitioners' application for a stay of the Ninth Circuit's

mandate to pay the award. In an opinion accompanying that grant, Justice Rehnquist suggested that this case presents the “significant question” under Section 1988 of whether “a court, in determining the amount of a ‘reasonable attorney’s fee’ under the statute, [should] consider the amount of monetary damages recovered in the underlying action.” *City of Riverside v. Rivera*, 106 S.Ct. 5, 6 (1985).

### SUMMARY OF ARGUMENT

The Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizes the award of “a *reasonable* attorney’s fee” (emphasis added) to the prevailing party in a civil rights action. In determining the amount of a fee award, the lower courts must be guided by the standards that Congress and this Court have adopted for ensuring that the fee is in fact “reasonable.” The initial stage of the fee determination process is the “lodestar” calculation—the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. In making this calculation, the court must not include hours that are excessive, redundant, or otherwise unnecessary. The court must also temper its calculation by the standards of “billing judgment” that generally govern the fee-setting process in the private sector. The lodestar figure should reflect only those hours and rates that an attorney could properly bill to a client. By simply awarding fees for *all* of the time respondents’ attorneys expended on the instant case, the courts below failed to observe these principles.

When awarding fees to a plaintiff who has achieved only limited success, the court often must make a downward adjustment of the lodestar figure. Under *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), fees awarded to a partially successful plaintiff must be “reasonable in relation to the results obtained” in the underlying lawsuit. There are two methods for adjusting the lodestar to arrive at a figure that meets this requirement. The

court may either deny fees for time spent on unsuccessful claims that are unrelated to the successful ones or, where all of the claims are related, it may simply reduce the award to reflect the results obtained. Both approaches have the effect of requiring that the amount of the fee award bear a reasonable relationship to the extent of the plaintiff's success. In a case such as this one, where the *only* relief obtained is monetary damages, the determination of whether a fee award is reasonable within the meaning of Section 1988 can best be achieved by requiring the amount of the fee award to bear some reasonable relationship to the amount of the damages award. The courts below made no reduction in the lodestar, and the resulting fee award is so vastly disproportional to the degree of respondents' success as to be unreasonable under Section 1988.

The underlying policies of Section 1988 support a rule that explicitly requires fees awarded to a partially successful plaintiff to bear a reasonable relationship to the plaintiff's success. Congress enacted Section 1988 to promote the vindication of our civil rights policies by facilitating the litigation of meritorious claims. By allowing only a plaintiff who has "prevailed" to receive fees, Congress sought to ensure that Section 1988 would benefit only litigants who actually do vindicate those policies. Congress also sought, however, to avoid the award of "windfall" attorney's fees. This Court has recognized that to achieve the proper balance between these policies when awarding attorney's fees to a partially successful plaintiff, it is necessary to focus on the degree of the plaintiff's success. The degree of success must be the focus, because an award of fees for all time spent on a lawsuit would encourage excessive litigation of claims that, although "related" to the successful claims, have little chance of success. In turn, attorneys would receive "windfall" fees far out of proportion to the limited success they achieve for their clients. An explicit propor-

tionality requirement would further reduce the incentive for such excessive litigation, but would still reward litigants who vindicate our civil rights policies.

## ARGUMENT

### I. THE ATTORNEY'S FEES AWARDED IN THIS CASE ARE NOT REASONABLE WITHIN THE MEANING OF SECTION 1988 BECAUSE THEY COMPENSATE TIME SPENT ON UNSUCCESSFUL CLAIMS THAT ARE UNRELATED TO THE SUCCESSFUL CLAIMS AND BECAUSE THEY DO NOT BEAR A REASONABLE RELATIONSHIP TO RESPONDENTS' LIMITED SUCCESS IN THE UNDERLYING LAWSUIT.

Although the respondents obtained only limited monetary relief on the merits of their claims and neither obtained injunctive relief nor caused the petitioners to change any of their practices, the lower courts awarded the *entire* fee requested by respondents. EEAC takes no position on what the precise amount of the fee award in this case should be, but submits that the lower courts' award is not reasonable within the meaning of Section 1988<sup>2</sup> because it does not bear a reasonable relationship to respondents' limited success. In failing to exercise the required "billing judgment," and in not limiting the amount of the fee award commensurate with respondents' success, the lower courts acted contrary to both the policies underlying Section 1988 and this Court's prior decisions.

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<sup>2</sup> 42 U.S.C. § 1988 states in pertinent part:

In any action or proceeding to enforce a provision of §§ 1981, 1982, 1985 and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a *reasonable* attorney's fee as part of the costs. (Emphasis added).



**A. The Lodestar Figure Was Not Properly Calculated In This Case Because The Lower Courts Did Not Exercise Prudent Billing Judgment And Did Not Carefully Examine The Hours Submitted For Excessive Or Redundant Time.**

The Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, is a fee-shifting provision that permits the court in a civil rights action to award "a reasonable attorney's fee" to the "prevailing party" as part of the costs assessed against the other party. This Court held in *Hensley v. Eckerhart* that fees awarded under this provision to a plaintiff who achieves only limited success must be "reasonable in relation to the results obtained." 461 U.S. 424, 440 (1983). In addition, the Court in *Hensley* emphasized that "[a] reduced fee award is appropriate if the relief, however significant, is limited *in comparison to the scope of the litigation as a whole*." *Id.* at 440 (emphasis added). For a plaintiff who has achieved limited success in the underlying lawsuit, therefore, a "reasonable" attorney's fee under Section 1988 is one that bears a reasonable relationship to the extent of the plaintiff's success.

The starting point for making the fee determination is the lodestar figure, arrived at by multiplying "the number of hours *reasonably* expended on the litigation . . . by a *reasonable* hourly rate." *Hensley*, 461 U.S. at 433 (emphasis added); *Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983). In making this calculation, the district court is required to exclude hours not reasonably expended by the fee applicant's attorneys.<sup>3</sup> Reductions

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<sup>3</sup> The party seeking a fee award is required to submit evidence supporting the hours claimed. This Court has ruled that "[w]here the documentation of hours is inadequate, the district court *may* reduce the award accordingly." *Hensley v. Eckerhart*, 461 U.S. at 433 (emphasis added). The First Circuit, moreover, has held that "the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in

must be made for overstaffing, for variations in the skill and experience of lawyers, and for excessive, redundant, or otherwise unnecessary time. *Hensley*, 461 U.S. at 434; *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 950 (1st Cir. 1984). This Court has also emphasized that the lodestar calculation should be tempered by the same "billing judgment" that is an important component of fee setting in the private sector. *Hensley*, 461 U.S. at 434; see also *Ramos*, 713 F.2d at 555. Both counsel for the prevailing party and the court that is making the fee determination must ensure that hours which would not properly be billed to a *client* are not charged to an *adversary* in calculating the lodestar. *Hensley*, 461 U.S. at 434, quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (emphasis in original); *Ramos*, 713 F.2d at 553.

The courts below did not follow these well recognized principles, but rather gave wholesale approval to the full fee request and ruled that *all* of the time spent on the

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any [fee] award or, in egregious cases, disallowance." *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984). The Tenth, Second, and District of Columbia Circuits have imposed similar requirements. See *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983) (requiring "meticulous, contemporaneous time records" of "all hours for which compensation is requested and how those hours were allotted to specific tasks"); *New York Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147 (2d Cir. 1983) (making contemporaneous time records a *prerequisite* for attorney's fees in the Second Circuit); *National Ass'n of Concerned Veterans v. Sec'y of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (requiring contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney"). To ensure greater accuracy in determining "a reasonable attorney's fee" in future cases, EEAC urges this Court to follow these decisions and expressly to require detailed, contemporaneous time records as a prerequisite to a fee award.

If the records submitted by respondents' attorneys in the instant case are not contemporaneous (and there is no evidence in the record that they are), a downward adjustment in the fee award should be made. *Hensley*, 461 U.S. at 433.



case was a proper basis for determining the fee award. The transcript of the original proceedings on the motion for attorney's fees makes abundantly clear that the district court was predisposed, even before receiving any time records, to grant "substantial attorneys fees" for whatever time the attorneys submitted. See Pet. Cert. at 32-33. Likewise, on remand for reconsideration in light of *Hensley*, the district court judge stated that the remand was only for the purpose of allowing that court to give "some more findings" to support its original award. See Pet. Cert., Appendix 15 at 15-4 - 15-5. The Ninth Circuit found no fault with the district court's approach on either occasion.

In a case such as this—involving the work of 2 attorneys and 2 law clerks over a five year period—it is inconceivable that there was not a single "excessive, redundant, or otherwise unnecessary" hour of work. See *Hensley*, 461 U.S. at 434; *Grendel's Den, Inc.*, 749 F.2d at 950. It is equally unlikely that a prudent exercise of billing judgment would not result in at least some reduction of the total time spent on the case. The Tenth Circuit has required that district courts making the lodestar calculation carefully examine whether specific tasks would normally be billed to a paying client and whether the number of hours spent on each task is reasonable. *Ramos*, 713 F.2d at 554. The district court in *Wabasha v. Solem*, 580 F. Supp. 448 (D. S.D. 1984), recognized that the amount of time actually expended on each task may not be "reasonable" for attorney's fees purposes, and the court reduced the requested hours accordingly. *Id.* 458-59. By not observing these principles in this case, the lower courts failed to arrive at "the number of hours reasonably expended on the litigation."

Having decided that *all* of respondents' attorneys' time should be compensated, the district court, affirmed by the court of appeals, calculated the lodestar based on rates of \$125.00 per hour for the attorneys and \$25.00 per hour for the law clerks. The EEAC takes no posi-

tion on whether these rates were reasonable, but even if they were, the lower court's calculation produced an unreasonable attorney's fee because the court had already decided to compensate an excessive number of hours. The court then committed the additional error of not moving beyond the lodestar to the next stage of the fee determination process.

**B. The Lower Courts Erred In Not Reducing The Lodestar To Account For Respondents' Limited Success In The Underlying Lawsuit.**

Although a proper lodestar calculation normally will provide the "reasonable" attorney's fee contemplated by Section 1988, there may be circumstances in which that basic standard "results in a fee that is either unreasonably low or unreasonably high." *Blum v. Stenson*, 104 S.Ct. 1541, 1548 (1984). A further inquiry must be made, therefore, into whether an upward or downward adjustment of the lodestar is necessary. *Hensley*, 461 U.S. at 434. The relevant considerations for determining a fee award are listed in *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714 (5th Cir. 1974), which Congress endorsed when it enacted Section 1988.<sup>4</sup> S. Rep. No. 1011, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5908, 5913.

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<sup>4</sup> The twelve considerations listed in *Johnson* are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) *the amount involved and the results obtained*; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-19 (emphasis added).

Significantly, the House Report on Section 1988 specifically highlighted "the amount received in damages, if any," as a factor in determining the amount of fees to be awarded. H.R. Rep. No. 1558, 94th Cong., 2d Sess. at 8 (1976).

This Court recognized in *Blum* that many of the *Johnson* factors will be subsumed into the lodestar calculation itself. 104 S.Ct. at 1548-49. For example, the number of billable hours recorded will reflect the novelty and complexity of the issues, while the reasonableness of the hourly rates will reflect the experience and skill of the attorneys and the quality of their representation. *Id.*; see also *Rybicki v. State Board of Elections of State of Illinois*, 584 F. Supp. 849, 858-59, 863 (N.D. Ill. 1984) (complexity of case and quality of representation reflected in the elements of the lodestar calculation); *Wabasha*, 580 F. Supp. at 463 (level of attorney's skill is compensated in the "reasonable hourly rate"). In determining whether an adjustment of the lodestar should be made for fees awarded to a partially successful plaintiff, "*the most critical factor* is the degree of success obtained." *Hensley*, 461 U.S. at 436 (emphasis added); *Blum*, 104 S.Ct. at 1549.

The Court in *Hensley* established two methods for ensuring that fees awarded to a partially successful plaintiff will in fact reflect the degree of success obtained by that plaintiff. The first approach focuses on whether the plaintiff failed to prevail on claims that are *unrelated* to the claims which succeeded. If a lawsuit raises claims for relief that are "based on different facts and legal theories," the attorney's work on one claim will be unrelated to work on another. *Hensley*, 461 U.S. at 434. This will be true "even where the claims are brought against the same defendants—often an institution and its officers, as in this case." *Id.* at 434-35. In these circumstances, work on the unsuccessful, unrelated claims "cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.'" *Id.* at 435, quoting *Davis v. County of Los Angeles*, 8 E.P.D. Par. 9444, at 5049 (C.D. Cal. 1974). "The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in

separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Hensley*, 461 U.S. at 435; see also *Smith v. Robinson*, 104 S.Ct. 3457, 3466 (1984) (fees are not properly awarded for the time spent on unsuccessful claims that are different from the claims on the basis of which relief was granted).

In *Smith v. Robinson*, this Court characterized *Hensley*'s discussion of the relatedness of claims as requiring "that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success." 104 S.Ct. at 3467. District courts are "charged with the responsibility, imposed by Congress, of evaluating the award requested in light of the relationship between particular claims for which work is done and the plaintiff's success." *Id.* Most federal courts have accepted this responsibility and have limited fee awards for partially successful plaintiffs accordingly. See, e.g., *Gates v. ITT Continental Baking Co.*, 581 F. Supp. 204, 211 (N.D. Ohio 1984) (awarding fees for time spent on claims of employment discrimination under Title VII and 42 U.S.C. § 1981, but denying fees for time spent on claims under 42 U.S.C. §§ 1983 and 1985 and a claim for a willful violation which would have entitled the plaintiff to punitive damages); *Oriental Federal Savings and Loan Assoc. of Puerto Rico v. Cardona*, 580 F. Supp. 784 (D. P.R. 1984).

In the instant case, respondents alleged four separate constitutional violations, four separate federal statutory violations, and eleven different tort violations under state law. Only 3 of these 19 claims were successful. The lower courts, however, did not carry out their mandate to evaluate the requested fee award in light of the relationship between each claim and the plaintiff's ultimate success. Rather, the district court summarily ruled that all of the claims were "closely related," while the Ninth Circuit concluded that respondents' attorneys "spent no time on claims unrelated to the successful

claims.” Much more careful scrutiny than this is required. Had the courts below exercised that scrutiny, they would have seen that many of the unsuccessful claims are clearly unrelated to those which succeeded.

The claims for property damage, breaking and entering a residence, and lost wages, for example, are not sufficiently “related” to any of the successful claims (under Section 1983 and for negligence and false arrest)<sup>5</sup> because they clearly are based on distinct underlying legal theories. Different elements of proof must be established to succeed on each of these claims. As the Court of Appeals for the First Circuit has held, attorney’s fees should not be granted for time spent litigating claims that rest “on legal theories distinct from those upon which appellant prevailed.” *Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir. 1984). The Eighth Circuit has observed that an affirmative action claim and a retaliation claim alleged in an employment discrimination action are not “related” because “[t]he legal underpinnings of the two theories are largely distinct.” *Sisco v. J.S. Alberici Construction Company, Inc.*, 733 F.2d 55, 59 (8th Cir. 1984). Many of the unsuccessful claims alleged by respondents rest on legal theories that are different from those on which they prevailed and attorney’s fees should not have been awarded for time spent on those unsuccessful claims.

The courts below also erred in awarding fees to respondents’ attorneys for time spent on claims against the 17 defendants who were dismissed from the case on motions for summary judgment. For attorney’s fee purposes, these claims are not “related” to the successful claims against the remaining defendants. *See Neal by*

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<sup>5</sup> To the extent that work done on even the successful negligence and false arrest claims can be separated from work done on the Section 1983 claim, the Respondents’ fees should be reduced. Such state law claims, of course, do not fall within the fee provision of Section 1988.



*Neal v. Berman*, 576 F. Supp. 1250, 1252 (E.D. Mich. 1982). Nor should the time spent defending the successful motions for summary judgment themselves be compensated. *Id.* The lower courts should have reduced the requested fee award to account for the time spent on these aspects of the case. As these examples show, respondents' attorneys expended considerable time on this case that was not "reasonably related to [their] ultimate success." *Smith*, 104 S.Ct. at 3467. Reductions in the amount of the requested fee award, therefore, were clearly warranted and should have been made. *Hensley*, 461 U.S. at 435.

Even if the courts below did not err in finding that the unsuccessful claims were "related" and thus compensable, the fee award should have been reduced based on the second method that *Hensley* provides for arriving at a fee award that reflects the degree of the plaintiff's success. This second approach is appropriate where all of the claims in a case "involve a common core of facts or [are] based on related legal theories." *Id.* "Such a lawsuit cannot be viewed as a series of discrete claims" and "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.*

If the plaintiff "has achieved only partial or limited success," the lodestar figure (the product of hours reasonably expended times a reasonable hourly rate) may be excessive and a downward adjustment will be necessary. *Id.* at 436. "*This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith.*" *Id.* Whether the district court accounts for the plaintiff's limited success by identifying specific hours to be eliminated or by making a flat reduction of the lodestar amount, "the most critical factor is the degree of success obtained." *Id.* at 436-37.

In the instant case, the district court, affirmed by the court of appeals, found that "time devoted to claims on

which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail." Even if that finding were correct, it would not justify the court's conclusion that a reduction in the requested fee award was unnecessary. *Hensley* explicitly recognized that it will sometimes be "difficult to divide the hours expended on a claim-by-claim basis," and that an alternative approach to adjusting the fee award will be necessary. *Id.* at 435. That is why the district courts are instructed to "focus on the significance of the overall relief obtained . . . in relation to the hours reasonably expended on the litigation" when all of the claims are related." *Id.* at 435.

In *Wabasha*, where the attorneys' time records did not permit a clear differentiation of the time spent on each of the plaintiff's legal theories, the court resorted to this alternative approach and ordered a 40 percent reduction in the lodestar because "the results obtained, although significant, were limited in nature and fell far short of the original goal." 580 F. Supp. at 464-65. The results obtained by respondents (success on 3 of 19 claims; 6 of 32 defendants found liable; no injunctive relief and no changes in petitioners' practices) are also clearly "limited" and "far short of the original goal." A reduction in the requested fee award, therefore, is clearly warranted.

Whether it is by denying fees for time spent on unsuccessful claims that are unrelated to the successful ones, or by reducing the lodestar for the plaintiff whose claims are related but who has achieved limited success, *Hensley* makes clear that fees awarded to a partially successful plaintiff must be closely tied to the extent of the plaintiff's success. "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." 461 U.S. at 440. In the instant case, where the *only* relief obtained was a relatively small damage award and no



injunction or changes in policy or other benefits resulted from the litigation, the extent of the respondents' success was clearly "limited in comparison to the scope of the litigation as a whole." This Court, therefore, should require that the amount of the attorney's fees awarded here bear a reasonable relationship to the damage award. By awarding fees that are so enormously disproportional to respondents' limited success, the courts below went far beyond the boundaries of the "reasonable attorney's fee" that Section 1988 permits.<sup>6</sup>

**II. THE POLICIES BEHIND SECTION 1988 SUPPORT A RULE THAT REQUIRES ATTORNEY'S FEES AWARDED TO A PARTIALLY SUCCESSFUL PLAINTIFF TO BEAR A REASONABLE RELATIONSHIP TO THE LIMITED SUCCESS OBTAINED IN THE UNDERLYING LAWSUIT.**

The primary policy underlying the fee-shifting provision of Section 1988 is a desire to promote the vindication of the civil rights of individuals by facilitating the litigation of meritorious claims. S. Rep. No. 1011 at 2-5, 1976 U.S. Code Cong. & Ad. News at 5909-13; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). This must not be misinterpreted as simply a general desire to foster more litigation. Congress intended to encourage "good faith actions" that would vindicate our civil rights policies. S. Rep. No. 1011 at 5, 1976 U.S. Code Cong. & Ad. News at 5912. By allowing only a plaintiff who has "prevailed" in such an action to receive fees, Congress sought to ensure that the benefits of Section 1988 would be limited to those litigants who actually do vindicate those policies. As this Court observed in *Christiansburg*

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<sup>6</sup> To the extent that certain courts have held or implied that a court is not even permitted to consider the amount of damages in calculating a fee award, see *DiFilippo v. Morizio*, 759 F.2d 231, 235 (2d Cir. 1985); *Ramos v. Lamm*, 713 F.2d at 557, such decisions should be rejected as contrary to the legislative history of Section 1988 and to prior decisions of this Court, as noted above.

*Garment Co. v. EEOC*, “when a district court awards counsel fees to a *prevailing* plaintiff, it is awarding them against a violator of federal law.” 434 U.S. 412, 418 (1978) (emphasis added).

Where a plaintiff has not “prevailed,” and thus where no violation has been demonstrated, there is no justification for an award of fees because no right has been vindicated. Likewise, where several violations are alleged, but only one or a few are proved, there is no justification for awarding more than the fees related to the proven violations. A partially successful plaintiff who seeks attorney’s fees for time spent on an unsuccessful challenge to a lawful practice is not cloaked in the mantle of public interest on that claim, and thus the policy reasons that generally support an award of fees to the plaintiff are not present.

In addition to allowing awards of attorney’s fees to prevailing plaintiffs, Congress also authorized fee awards *against* plaintiffs who litigate in “bad faith” under the guise of enforcing Federal rights. S. Rep. No. 1011 at 5, 1976 U.S. Code Cong. & Ad. News at 5912; *see also Christiansburg Garment Co.*, 434 U.S. 412. Moreover, the standards that Congress adopted for determining the amount of the fee award are intended to result “in fees which are adequate to attract competent counsel, *but which do not produce windfalls to attorneys.*” S. Rep. No. 1011 at 6, 1976 U.S. Code Cong. & Ad. News at 5913; *see also* H.R. Rep. No. 1558 at 6 (emphasis added). The Fifth Circuit decision cited by Congress as containing the proper standards to be employed in awarding attorney’s fees explicitly states that the Title VII fee-shifting provision after which Section 1988 is patterned was not “passed for the benefit of attorneys” and should not be used “to make the prevailing counsel rich.” *Johnson*, 488 F.2d at 719; *see also Stanford Daily v. Zurcher*, 64 F.R.D. 680, 687 (N.D. Cal. 1974) (also cited by Congress, the opinion adopts a standard that “at-

tempts to avoid any unreasonable enrichment of the attorneys who ask the court for fees”).

Other federal courts have recognized Congress’ clear intent that Section 1988 not serve as the vehicle for awarding “windfall” attorney’s fees. *See, e.g., Grendel’s Den, Inc.*, 749 F.2d at 950; *New York Ass’n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1139, 1149, 1150 (2d Cir. 1983). Thus, while Section 1988’s primary purpose is to increase access to the judicial system to advance fundamental public policies, the statute embodies the additional goal of avoiding unwarranted or excessive attorney’s fees.

It is especially difficult to strike the proper balance between these conflicting policies when awarding fees to a plaintiff who has achieved only partial success in the underlying litigation. There is a distinct danger in such cases that the award of excessive fees based on the full scope of litigation that ultimately failed in many respects, may result in a windfall to the plaintiff’s attorney and may encourage excessive litigation of questionable or unnecessary claims. It was to avoid this result that this Court held in *Hensley* that the fee award for a partially successful plaintiff must be “reasonable in relation to the results obtained,” 461 U.S. at 440, and that “the most critical factor” in determining the amount of the award “is the degree of success obtained.” *Id.* at 436. This emphasis on the degree of the plaintiff’s success ensures that attorney’s fees will be awarded only to the extent that the plaintiff has vindicated some important public policy and thus has fulfilled the purpose of Section 1988.

As discussed above, this Court observed in *Hensley* that “[a] reduced fee award is appropriate if the relief, however significant, is limited *in comparison to the scope of the litigation as a whole*.” *Id.* at 440 (emphasis added). The Court stopped short of explicitly requiring

that the fee award be “proportional” to the relief obtained. In cases such as this, however, where only damages are involved, the EEAC submits that the adoption of a requirement that fees bear a reasonable relationship to the amount of damages recovered would better ensure the relationship between the fee award and the plaintiff’s degree of success that *Hensley* recognized as being necessary to fulfill the purposes of Section 1988.

In *Christiansburg Garment Co.*, this Court suggested that awarding fees only to *prevailing* plaintiffs would not in itself be an incentive for plaintiffs to bring claims that have little chance of success. 434 U.S. at 422. For the plaintiff who is deemed “prevailing” even though he or she has achieved limited success, however, this will be true only if there is a requirement of some reasonable degree of proportionality between the amount of the fee award and the relief obtained.

A plaintiff’s attorney knows that succeeding on any significant civil rights claim will qualify the plaintiff as a “prevailing party” and in most cases will entitle the plaintiff to some amount of attorney’s fees. See *Hensley*, 461 U.S. at 433. If there is a possibility that the court may award fees for time spent on *unsuccessful* claims on the grounds that they are “related” to the successful ones or are derived from a “common core of facts,” *id.* at 435, there is a strong incentive for the attorney to allege such claims despite their marginal chances of success. The attorney may be willing to gamble that the district court will read *Hensley* as permitting an award of fees for time spent on all of the claims. That is precisely what the lower courts in the instant case did, awarding respondents’ attorneys a substantial windfall for their limited success. A requirement that the amount of the fee award must bear some reasonable relationship to the plaintiff’s degree of success would clarify *Hensley*, however, and would remove any incentive to allege numerous claims that, although minimally “related,” have little or no

chance of success. Consequently "windfall" attorney's fees would be avoided.

In addition, such a requirement would relieve defendants of the burden of having to pay the full costs of *both* sides of a case in which multiple unnecessary claims have been alleged. As a matter of fundamental fairness, defendants should not be required to finance the plaintiff's costs of excessive and over-zealous litigation of claims that prove to be unmeritorious as well as bearing their own defense costs. Even where some of a defendant's actions ultimately are proven to be unlawful, the defendant should not be forced to suffer the additional penalty of paying for a plaintiff's unnecessary claims.

This Court established in *Blum* that the lodestar calculation alone will normally provide a "reasonable" attorney's fee outside the context of the partially successful plaintiff, and that an upward adjustment of that figure will be justified only "in the rare case." 104 S.Ct. at 1548, 1550 n. 18; *see also Hensley*, 461 U.S. at 435 (an enhanced fee award may be justified "in some cases of exceptional success"). Thus, the proportionality requirement urged here would not mean that the amount of attorney's fees must be *directly* proportional to the amount of damages or other relief awarded. Rather, this requirement merely would provide the district courts with clearer guidance when making downward adjustments of the lodestar to account for a plaintiff's limited success. Because the Court's decision in this case will affect the interpretation and application of a variety of other attorney's fees provisions, any clarification that can be achieved here could greatly reduce the considerable stream of attorney's fees litigation that has engulfed the federal courts.



**CONCLUSION**

For the foregoing reasons, EEAC respectfully urges that the Ninth Circuit decision be reversed and the case be remanded to the district court for the determination of a fee award that bears a reasonable relationship to the limited success obtained in the underlying lawsuit.

Respectfully submitted,

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December 16, 1985

DEC 16 1985

No. 85-224

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

\_\_\_\_\_  
CITY OF RIVERSIDE, *et al.*,  
*Petitioners,*  
v.

SANTOS RIVERA, *et al.*,  
*Respondents.*  
\_\_\_\_\_

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

\_\_\_\_\_

BRIEF OF AMICI CURIAE  
CONGRESSMEN THOMAS J. BLILEY, JR.,  
PHILIP M. CRANE, WILLIAM E. DANNEMEYER,  
NEWT GINGRICH AND THE WASHINGTON LEGAL  
FOUNDATION IN SUPPORT OF PETITIONERS  
(FILED WITH WRITTEN CONSENT)

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## QUESTIONS PRESENTED

1. Whether, on the facts of this case, the recovery of \$33,350 in total damages against only six out of 32 defendants originally sued constitutes a sufficient degree of success to justify an attorney's fee award of over \$245,000 under the "reasonableness" standard of the Civil Rights Attorney's Fees Awards Act.

2. Whether it is "reasonable" within the meaning of the Awards Act to compensate the prevailing party's attorneys for all time spent on extraneous claims against multiple defendants which, even though related in theory to the claim on which plaintiffs prevailed, were summarily dismissed under F.R. Civ. P. 56.

3. Whether, in a case where non-monetary relief was not granted, court-awarded attorneys fees which are substantially larger than the total damages awarded to the plaintiff can ever be considered "reasonable" within the meaning of the Awards Act.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

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No. 85-224

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CITY OF RIVERSIDE, *et al.*,  
*Petitioners,*

v.

SANTOS RIVERA, *et al.*,  
*Respondents.*

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On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE  
CONGRESSMEN THOMAS J. BLILEY, JR.,  
PHILIP M. CRANE, WILLIAM E. DANNEMEYER,  
NEWT GINGRICH AND THE WASHINGTON LEGAL  
FOUNDATION IN SUPPORT OF PETITIONERS  
(FILED WITH WRITTEN CONSENT)

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**INTERESTS OF AMICI CURIAE**

Rep. Thomas J. Bliley Jr. is a United States Congressman representing the Third District of Virginia. Rep. Philip M. Crane is a United States Congressman representing the Twelfth District of Illinois. Rep. William E. Dannemeyer is a United States Congressman repre-



senting the Thirty-ninth District of California. Rep. Newt Gingrich is a United States Congressman representing the Sixth District of Georgia.

Each of the congressional amici is deeply concerned regarding abuses of the Civil Rights Attorney's Fees Awards Act of 1976 ("the Act"), 42 U.S.C. § 1988, a federal statute enacted by Congress. While the amici all support effective enforcement of the civil rights laws, they are firmly committed to the view stated in the Act's legislative history that it should never be used to sanction economic "windfalls" for attorneys. H.R. Rep. No. 94-1558, p. 9 (1976); S. Rep. No. 94-1011, p. 6 (1976). Yet grossly disproportionate fee awards such as that in the instant case are now approved by federal courts with disturbing frequency. The harm resulting from such exorbitant awards is compounded by the fact that the largest awards—sometimes exceeding *millions* of dollars—are commonly assessed against state and local government defendants. This is of particular concern to the congressional amici, since millions of dollars in state revenues are thereby being diverted to prosperous lawyers at the expense of local government programs which would otherwise benefit their constituents. This brief, therefore, reflects the strong sense of the congressional amici that the Awards Act is being used to sanction economic windfalls for lawyers that Congress never intended to allow.

Amicus the Washington Legal Foundation ("WLF" or "Foundation") is a non-profit public interest law center that engages in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members located throughout the United States (including in the State of California) whose interests the Foundation represents.

This brief is filed by WLF with the written consent of all parties.

WLF focuses its litigation efforts on cases of nationwide significance affecting the liberties and values of its members. For example, WLF has filed amicus briefs with this Court in such cases as *Memphis Firefighters v. Stotts*, 104 S. Ct. 2576 (1984); *General Building Contractors Association, Inc. v. Pennsylvania*, 102 S. Ct. 3141 (1982); and *United Steelworkers v. Weber*, 444 U.S. 193 (1979).

WLF's interest in this case stems from its strong concern that the Awards Act is being used to subsidize a profitable "cottage industry" for activist lawyers at the bitter expense of state and local taxpayers. In case after case, prosperous big city law firms, self-styled civil liberties groups, and "legal services" groups are collecting excessive court-ordered fees drawn from state and local revenues to subsidize their litigious onslaught against state and local governments.

The disturbing question posed by this case is, why should the ordinary taxpayer be forced to underwrite legal fees which no sensible private sector client would *even consider* paying in consideration for the limited or questionable results achieved? WLF submits that it is manifestly *unreasonable* to award these lawyers fees which they could not conceivably command for the results achieved in a genuinely competitive market place.

WLF believes that the rights of the American taxpayers who unknowingly subsidize these abuses demand that rigorous standards be imposed to bring these exorbitant fees down to earth. This case presents this Court with a rare opportunity to do just that.

### STATEMENT OF THE CASE

In the interests of brevity, the amici curiae adopt the statement of the case set forth in the brief of the petitioners.

## SUMMARY OF ARGUMENT

1. The award of grossly disproportionate attorney's fees in this case reflects a nationwide problem of scandalous proportions. Too many federal courts routinely approve inflated claims for fees under 42 U.S.C. § 1988 without applying any genuine standards of reasonableness. Since many of these excessive fee awards are levied against state and local government defendants, they are causing a counterproductive and unwarranted diversion of public revenues to the unjustified enrichment of prosperous counsel. The Supreme Court should enunciate stricter standards of reasonableness under § 1988, starting with a legal presumption that attorney's fees that exceed the damages are inherently unreasonable in the absence of significant non-monetary relief.

2. Both lower courts flagrantly disregarded the holdings of *Hensley v. Eckerhart* as well as this Court's remand order in this case. The district court's extreme recalcitrance is clearly evidenced in its defiant statement at the remand hearing that it would not change the award at all. Both courts' opinions on remand reveal that they deliberately avoided compliance with the principles of *Hensley* and then proceeded to openly defy those principles.

3. The district court's stated rationale for reaffirming the \$245,343.75 award displays reversible errors of law and fact. The Court refused to acknowledge that the relief achieved was limited in relation to the scope of the litigation as a whole. Its stated justification for the gaping disparity between relief and award was legally and factually misconceived. And a critical factual premise for the court's evaluation—i.e., that jury's do not often award large damage awards in police misconduct cases—was clearly and demonstrably erroneous.

## ARGUMENT

### I. THE PALPABLY DISPROPORTIONATE FEES AWARDED IN THIS CASE REFLECT THE LOWER COURTS' FAILURE TO APPLY MEANINGFUL STANDARDS OF REASONABLENESS.

The attorney's fees awarded in this case are so palpably disproportionate to the relief obtained—i.e., paying someone over \$7 to help gain you \$1—that any sensible non-lawyer would immediately recognize that something was amiss in the system that sanctions them. No reasonable client would agree to pay attorneys \$245,000 for their services in pursuing litigation that yielded only \$33,350 in total recovery. Such a disproportionate fee is *intrinsically* unreasonable, within the plain meaning of 42 U.S.C. § 1988. It is not even a close case. Nonetheless, the courts below held that the taxpayers of the City of Riverside, California must pay such extraordinary fees for the “service” of having litigation waged against 31 of their city's police officers. Most of those officers were absolved of all liability.

Such incidents have grown commonplace throughout the country, to the point where astronomical fees paid to plaintiffs' lawyers due to proliferating “civil rights” suits have become a serious drain on state and local government revenues.

There is no sound reason for this state of affairs to exist or continue, since fees awarded under section 1988 are already subject to a statutory standard of “reasonableness”. It only remains for the courts to give objective force and content to that standard. This case affords a suitable opportunity for this Court to take the lead in that task.

Excessive and exorbitant fees are awarded in these cases because too many courts blithely assume that whatever amount of time attorneys devote to a civil rights case is automatically “reasonable” and fully com-

pensable. Yet evidence from case after case documents that attorneys too often submit grossly excessive claims for fees in cases covered by § 1988. *See, e.g., Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1275 (N.D. Ohio 1985) (attorneys awarded \$348,000 on their claim of \$723,194 in abortion case); *Jacquette v. Black Hawk County Iowa*, 710 F.2d 455 (8th Cir. 1983) (award of \$20,437 on attorney's claim for \$96,422). It is time for the courts to stop condoning and even encouraging this exploitative trend. More rigorous and exacting judicial standards are necessary to restore genuine meaning to the "reasonableness" limitation on fees awarded under the Act.

This Court should clarify and reemphasize the fee-restraining standards it described in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and set forth still tougher standards and restrictions to contain the unconscionable excesses which characterize so many fee awards today under § 1988. In particular, the Court should establish a strong legal presumption that, at least in cases where there has been no significant injunctive relief, attorney's fees exceeding the amount of damage recovery are unreasonable. It should also establish a firm rule that reasonably specific contemporaneous records of chargeable hours are a mandatory component of reasonable claims for fees under § 1988.

#### **A. The Shockingly Disproportionate Fees In This Case Reflect A Nationwide Problem Of Scandalous Proportions.**

The exorbitant attorney's fees levied against the taxpayers of the City of Riverside in this case typify a phenomenon which has become all too commonplace in recent years.

A relatively limited individual grievance filed by a prisoner, a student, or a mental patient against the state is soon escalated by aggressive civil rights counsel into



an uncompromising, "across-the-board" attack on the practices of the government institution in question. Or an isolated incident of police malfeasance is pursued in court with a vindictive intensity that places the incident out of all proportion to the overall, day-to-day performance of the hard-working police force in question. It is instructive to keep in mind here that the more broadly these cases can be framed, the greater the scope for generous fee awards to plaintiffs' counsel. See *Copeland v. Marshall*, 642 F.2d 880, 911-12 (D.C. Cir. 1980) (Wilkey, J., dissenting).

In these categories of cases, counsel for civil rights plaintiffs pursue the litigation with an unfettered zeal which assumes the proportions of a single-minded crusade. Imbued with the unalloyed "virtue" of their cause—not to mention the substantial likelihood of healthy court-ordered legal profits—these attorneys devote endless hours pursuing even the smallest details of their cases. See e.g., *Grendel's Den, Inc. v. Larsen*, 749 F.2d 945, 952-54 (1st Cir. 1985); *Copeland v. Marshall*, *supra*. Time is simply no object—except when it becomes time to convert accumulated hours into lucrative fees under § 1988. Then it becomes significant indeed, and every hour conceivably allocable to the case in question is recalled or "reconstructed" with remarkable thoroughness. If counsel manage to "prevail" in the case at all—and a routine settlement or winning on only one out of eight claims is for some curious reason treated as "prevailing" in this odd context—they can be confident that a receptive federal judge will ratify the "reasonableness" of their entire efforts, *and more*. See *Ross v. Saltmarsh*, 521 F. Supp. 753 (S.D.N.Y. 1981) (\$277,104 fee, including 25% "bonus", for settlement of case challenging procedures for suspending public school students).

Under these permissive standards, there is no disincentive at all to restrain the lawyer's foible of "massive legal overkill," see *Henry v. First National Bank of Clarksdale*, 603 F. Supp. 658, 663-65 (N.D. Miss. 1984).

On the contrary, there is every powerful incentive to roll-up and "churn" billable hours to the fullest extent possible, with the collection of a "lodestar" fee award virtually guaranteed by the lower courts' uncritical generosity in dispensing lawyer's profits. As evidenced by this case, prevailing on even a small portion of the claims asserted enables counsel to collect in full for pressing dubious "related" claims even though they may have been ignominiously defeated. And as further illustrated by this case, some district courts have been remarkably indulgent in overlooking shoddy, self-serving methods of recording "billable" time. See, e.g., *Grendell's Den, Inc. v. Larsen*, *supra*, 749 F.2d at 951-52; *Jacquette v. Black Hawk County Iowa*, *supra*, 710 F.2d at 464.

But in enacting the Awards Act, Congress stressed that economic "windfalls" for attorneys were not to be condoned. S. Rep. No. 94-1011, 94th Cong., 2d Sess. p. 6 (1976). In keeping with that warning, this Court only recently admonished against awarding attorney's fees which are disproportionately large in comparison to the actual results obtained; fees based on 100% of "raw" hours which fail to reflect even minimal "billing judgment"; fees which are the product of wasteful overstaffing or duplicative effort; and fees which are not adequately supported by reliable, contemporaneous billing records. *Hensley v. Eckerhart*, *supra*, 461 U.S. at 433-40. The presence of these or other billing abuses provide sufficient basis for a reviewing court to reject and reduce an exorbitant fee claim. That is precisely the case here.

Regretfully, some lower courts have been less than diligent in enforcing *any* kind of standards to govern exorbitant attorney's claims under § 1988. The enormous frustration of those who have sought to curtail this unwarranted exaction on state and local taxpayers was captured perfectly by Judge Malcomb Wilkey, dissent-



ing, in *Copeland v. Marshall*, 641 F.2d 880, 908 (D.C. Cir. 1980), where he prophetically observed:

In our colleagues' "lodestar" opinion, the path of attorney's fees in Title VII litigation is easy to discern. It is Up, Up, and Away! It is Per Calculos Ad Astra. [Citation omitted].

Judge Wilkey was moved to his dissent in *Copeland* by a fee award of \$160,000 to the prosperous Washington, D.C. law firm of Wilmer, Cutler, and Pickering (the firm had actually claimed even more, \$206,000) as a reward for recovering \$31,345 in backpay in an employment discrimination action against the federal government. His dissent thoroughly and prophetically described the outrageous fees which will continue to be rolled-up against government defendants as long as plaintiffs' counsel are

. . . assured from the outset that all hours spent on the case will be reimbursed at the firm's customary rate so long as its efforts are relevant to issues on which it ultimately prevails. [641 F.2d at 911]

This case confirms the wisdom of Judge Wilkey's dire prophecies in *Copeland v. Marshall*. Since plaintiffs' counsel were confident they would establish at least *some* liability for the ill-conceived police action in issue, they had every incentive to plead and pursue the case in the broadest possible terms. Even if most of their wide-ranging claims were dismissed (as they actually were), the certain recovery on the "core" claim would enable them to claim fees for *all* their work on the flexible judicial theory of "inter-related" claims.

Current practice under § 1988 is thus clearly encouraging over-inclusive claims, gross over-utilization of attorney time, and consequently a disproportionate (and regressive) shifting of public resources to litigious counsel. Judge Wilkey's thoughtful analysis of developing practice under the Awards Act in *Copeland v. Marshall*

led him to describe the resultant system as one that is devoted to "the care and feeding of lawyers rather than injured plaintiffs." 641 F.2d at 909. As proven once again by this case, he was right.

The nature and implications of the lower court's errors in this case are best understood by recognizing the broader problem of excessive fee awards under the Act. The excessive fees awarded here are merely an egregious example of the shocking "windfall legal profits" which are now dispensed with seemingly casual largesse by various federal courts nationwide. The essential error of both courts below in this case—i.e., their failure to apply any objective standards of reasonableness and proportionality to the fees awarded—surfaces in case after case where grossly excessive fees have been awarded. If the ruling below is allowed to stand by this Court, windfall awards like those described below will continue to be commonplace.

In *Grendel's Den, Inc. v. Larsen*, *supra*, the district court awarded over \$300,000 to two Harvard law professors for helping their client to obtain a liquor license on constitutional grounds. On appeal, the First Circuit determined that those fees were triple the amount that was reasonable. The Court of Appeals found that the professors had charged an excessive hourly rate; had expended hours of preparation far beyond what was reasonably necessary; had claimed fees for duplicative and excessive time spent (e.g., "doubling up" for hearings when only one lawyer participated); and had claimed fees not supported by *any* contemporaneous time records. 749 F.2d at 951-55. Therefore, the \$323,508 fee award was reduced to \$113,640. But under the shapeless and invertebrate "standards" applied by the Ninth Circuit in *this* case, this \$323,000 "windfall" would undoubtedly have been approved to the last dollar.

Similarly shocking overcharges characterized the case of *Henry v. First National Bank of Clarksdale*, 603 F.

Supp. 658 (N.D. Miss. 1984). There, a prominent Washington, D.C. law firm (Hogan & Hartson) utilized the services of no less than *nine* of its attorneys in obtaining an injunction against enforcement of a state court judgment which had enjoined an NAACP boycott of local merchants. The plaintiffs attempted to claim \$227,000 as "reasonable" attorney's fees, but the district court awarded "only" \$112,096. Because they are so highly relevant to the basic issue at hand, some of the district court's observations on the various billing abuses presented in the *Henry* case warrant quotation at some length. (*Id.* at 664-66) :

[W]e conclude that there was substantial duplication of effort by the several attorneys involved which should not be rewarded by this court. . . . (E)xamination of the time sheets generated in this cause leaves the court with the stark impression that *counsel were engaged in massive legal overkill.*

\* \* \* \*

The court finds that the presence of more than one Hogan & Hartson attorney at the TRO and preliminary injunction hearings in Oxford, Mississippi, . . . was not reasonably warranted under the circumstances.

\* \* \* \*

As was true of counsel's conduct of the litigation and the trial court, Hogan & Hartson's involvement in the appellate proceedings is marked by *extravagant usage of time and an utter failure to exercise billing judgment.* In determining what time is properly excludable, we follow the compelling guideline expressed in the legislative history of Sec. 1988: *the statute "may not be subverted into a ruse for producing 'windfalls' for attorneys."* *Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983) (citing S. Rep. No. 1011 at 1, 94th Cong., 2d Sess. (1976), reprinted in (1976) U.S. Code Cong. & Ad. News 5908, 5912-13) [emphasis added].

Again, both courts below in this case applied a "rubber stamp" approach which would never have questioned the abusive practices rebuked in the *Henry* case. The Ninth Circuit and the district court would have tersely approved the entire \$227,000 claim for fees simply because the case was "difficult" and the results "outstanding."

Further typifying the abuses at issue here is *Jacquette v. Black Hawk County, Iowa*, 710 F.2d 455 (8th Cir. 1983). There, the "relief" obtained was a paltry \$1,500 settlement in an action challenging a single termination of employment on due process grounds. For this, plaintiff's attorneys filed a request for over \$96,000<sup>1</sup> in attorney's fees and were awarded \$20,437 in fees and \$2,315 in costs. On appeal, the Eighth Circuit delivered a scathing indictment of the enormous disparity between relief and attorney's fees, stressing that the Awards Act "should not serve as a vehicle to charge exorbitant fees." 710 F.2d at 463. Nonetheless, the court inexplicably declined to disturb this still overly-generous award, but remanded the claim with instructions for the lower court to inquire into the appropriateness of disciplinary sanctions for the inflated fee request. Dissenting from the court's approval of even the \$20,000 award, Judge Bright observed:

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<sup>1</sup> To appreciate the full flavor of the abuses at work here, the Court should consider not only the shocking magnitude of the court-approved awards, but the even greater size of the fee requests submitted by counsel. A survey of the cases shows a disturbing gap between what attorneys claim and what is ultimately held reasonable by even the most permissive courts. E.g., *Akron Center for Reproductive Health v. City of Akron*, 604 F.Supp. 1275 (N.D. Ohio 1985) (attorneys were awarded \$368,709, but had claimed \$723,194); *Lampheare v. Brown University*, 610 F.2d 46 (1st Cir. 1979) (attorneys awarded \$252,600, but had claimed over \$500,000). Viewed most charitably, what emerges from reviewing these cases is that many attorney-claimants have a distinctly inflated notion of the reasonable value of their own services.

[T]he real losers in this case are the taxpayers who have had to pay the ultimate cost of this litigation. This case emphasizes to judges and attorneys alike the need to find ways to stem the inordinately high cost of litigation in cases like Jaquette's. [710 F.2d at 464]

There are countless additional cases where the extreme disproportion between the limited relief obtained and the enormous attorney fees awarded demonstrates the compelling need for effective standards which will curtail this insupportable profligacy with public funds. *E.g.*, *Texas State Teachers Association v. San Antonio Indep. School District*, 584 F. Supp. 61 (W.D. Tex., 1983) (compensatory and punitive damages totaling \$25,135, compared to counsel's fee award of \$158,801); *Copeland v. Marshall, supra* (\$31,345 in backpay, compared to \$160,000 fee award); *Cunningham v. City of McKeesport*, 753 F.2d 262 (3d Cir. 1985) (petition for certiorari pending) (\$17,000 in damages to house purchased for \$2,700, compared to \$35,887 fee award).

In many of these cases, the attorney's fees assessed against a state or local government are so enormous that they become a major draw-down upon the state or county government budget. The huge outlays ordered by courts to be paid to attorneys thus become a substantial diversion of funds from fundamental government programs—often the very programs which the attorneys claim to be serving in their lucrative taxpayer-subsidized litigation efforts. *This factor should be incorporated into the "reasonableness" assessment in cases against government defendants.* For example, it is not reasonable to divert millions of dollars from state funds available for prison reform in order to pay outside "civil rights" lawyers to sue for prison reform.

Few cases illustrate this phenomenon better than *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1984), the controversial Colorado prison litigation. There, the dis-



district court awarded over \$700,000 in legal fees to a coalition of ACLU and "National Prison Project" attorneys for their efforts in litigation over conditions at the prison in Canon City, Colorado. The court attempted to justify its enormous economic largesse by focusing upon the large amounts of time devoted by the lawyers in pursuing the prison reforms in court. But what the district court and the court of appeals inexplicably ignored as they strained for a rationale to justify these exorbitant fees was that they were "earned" in litigation which was largely a wasteful exercise. 713 F.2d at 560-61 (Barrett, J., dissenting).

In 1976 and 1977, the Colorado legislature had already appropriated over \$22 million for the renovation of existing prison facilities and the construction of new ones. The five-week trial staged by counsel was therefore an exercise in legal redundancy; Colorado had *already* recognized the deficiencies in its prison system and was devoting an enormous portion of its state budget to prison improvement and construction. It is highly instructive that the legal fees awarded for the *Ramos v. Lamm* suit exceeded the total cost budgeted for an entire new correctional facility.

Even though the Tenth Circuit remanded the \$739,000 "bonanza" award to the district court with instructions to reconsider it in light of guidelines set forth by the court of appeals, at least one member of the panel was convinced that the award was a travesty. As Chief Judge Barrett wrote in dissent, 713 F.2d at 560-61:

The public interest was not served—in fact it was ill-served—and the Colorado taxpayers were abused by the trial court's award of \$709,933.50 and expenses in the amount of \$32,782.43. The five week trial involved a parade of national prison system facility experts and a full array of at least *twelve lawyers* representing Ramos who have claimed that their efforts required the expenditure of in excess of

9,000 hours in the public interest. In my view, *this was unnecessary, uncalled for, and contrary to the public interest, working to the detriment of the taxpayers of Colorado.* [Emphasis added].

See also *Oliver v. Kalamazoo Bd. of Education*, 576 F.2d 714 (6th Cir. 1978), where the district court had acknowledged that "This [\$357,029] fee award will draw upon public funds at a time when financial resources are especially dear."

While prison reform litigation has been an especially bountiful field to cultivate for counsel who exploit the Act's award provisions, other areas of civil rights practice have been comparably lucrative. In *White v. City of Richmond*, 713 F.2d 458 (9th Cir. 1983), for instance, counsel recovered \$694,185 in fees in a wide-ranging "police brutality" case which was settled without a trial. Indeed, attorneys have been richly rewarded in case after case where intimidated state or county defendants have agreed to settle or sign a consent decree without putting plaintiff's counsel to the actual test of a trial. In *Liddell v. Bd. of Education*, No. 72-100C(3) (D. Mo., Dec. 28, 1984), two prominent and prosperous law firms were generously awarded \$2,400,000 of the taxpayers' money for their legal efforts in pressuring a City Board of Education to agree to a busing settlement. Given the routine readiness with which courts throughout the United States have handed down busing orders in the past 20 years, it is difficult to comprehend why the procurement of such a routine result should warrant such a grotesquely disproportionate fee award.

The painful lesson of these cases is that claims for "lodestar" fees based on total hours "worked"—"work" in this context often including, *e.g.*, relaxation in the seat of an airplane, billed in full as "travel time", or so-called "stand-by" time—simply cannot be ratified at face value, as was done in this case. A far more exacting degree of



scrutiny is demanded if the “windfalls” so pointedly denounced in the Act’s legislative history are to be avoided in the future. Courts must be required to separate the over-inclusive “raw” hours submitted by counsel from the “hard” or productive hours which alone can be used as the starting point for determining a reasonable fee. *Ramos v. Lamm, supra*, 713 F.2d at 553. To the extent that counsel’s imprecise recordkeeping makes such separation unmanageable, then *counsel* must be required to pay for the deficiency in terms of a reduced fee. These considerations were impermissibly ignored by both lower courts in this case.

Most pertinently for this case, a plaintiff’s mere success in establishing *some* liability in a given case should not be enough to permit complete reimbursement for all time spent on all aspects of the case. Limited success must be matched with limited compensation. Anything different is simply not reasonable, and will continue to foster wasteful proliferation of claims and unproductive legal maneuvering in these civil rights cases.

## II. THE RULING BELOW MOCKS THIS COURT’S HOLDING IN *HENSLEY* AND THE REMAND ORDER IN THIS CASE.

In *Hensley v. Eckerhart, supra*, this Court made it unmistakably clear that fee awards under § 1988 must take into account, and must reflect, the relative degree of success achieved in the litigation. This means that the magnitude of the attorney’s fees must be at least roughly proportional to the measureable relief or recovery achieved in the litigation. The “proportionality” factor is especially important in cases (like this one) where numerous claims are joined together in one complaint, but only a limited number of them ultimately prevail.

Writing for the Court in *Hensley*, Justice Powell repeatedly emphasized this basic consideration in terms

which can leave no room for argument as to its significance:

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. [461 U.S. at 436]

\* \* \*

Again, the most critical factor is the degree of success obtained. [*Id.*]

\* \* \*

A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole. [*Id.* at 440]

Further, while the Court acknowledged that the trial court retains appropriate discretion in fixing fee awards, it still pointedly admonished that "This discretion, however, must be exercised in light of the considerations we have identified." *Id.* at 437.

These binding principles from the *Hensley* ruling could hardly be more pertinent to this case had they been expressly designed for it. Given the comprehensive and ambitious scope of the 32-defendant, multiple-cause-of-action complaint in this case, there is no denying the fact that the \$33,000 liability established against only six defendants was "limited in comparison to the scope of the litigation as a whole." *Id.* The grotesque asymmetry between the modest recovery for the clients and the princely \$245,000 attorney fees for their two counsel presents *exactly* the kind of legal miscarriage which cries out for reformation under the *Hensley* principles.

But despite this Court's remand with instructions to apply the foregoing principles from the *Hensley* opinion, the district court made it clear from the first that it was not going to reconsider so much as a penny of its award. As the district court stated at the hearing held

to show formal "compliance" with this Court's order (R.T., vol. B. App. 15 at 15-4, -5, and -14):

[The Supreme Court] merely wants the court to give it some more findings. . . . *I tell you now that I will not change the award. I will simply go back and be more specific about it.* [Emphasis added].

Rarely has a lower court's flagrant disregard for this Court's authority been so openly flaunted. To allow such judicial lawlessness to go uncorrected is to risk compromising the binding authority of this Court's orders and rulings which is essential to the operation of our constitutional system of government.

Obviously, the district court had no intention of re-evaluating its award in light of the principles stressed in *Hensley*. Those principles were incompatible with the district court's avowed purpose of compensating plaintiffs' counsel for any and all hours they might claim, regardless of what those hours represented. Rather, the district court's sole object on remand was to "retailor" its findings and conclusions to create the *illusion* of compliance with the remand order.

But the United States Supreme Court does not vacate decisions and remand them to already overburdened federal courts for the purpose of obtaining mere "lip service" or a form of cynical, *pro forma* reconsideration. Yet that is precisely what resulted here. The district court made good on its word that it would "not change the award" and that it would confine itself to a cosmetic rearrangement of its findings.

This Court should reject the self-serving findings of fact and conclusions of law which are mechanically recited in the district court's remand opinion. That document reflects only a profound misunderstanding of the facts and the law, coupled with an attempt to obscure the *Hensley* issues in a smog of empty generalities and conclusory pronouncements.

**A. The District Court Refused To Adjust The Award To Reflect Only "Partial Or Limited Success," In Clear Violation Of *Hensley's* Requirements.**

Plaintiffs ultimately prevailed against six out of 32 defendants and on only three out of 22 original claims. Damages recovered against all defendants totalled only \$33,000, as against the six-figure awards so frequently awarded in "police brutality" suits (see cases cited p. 22, *infra*).

There can be no question, therefore, that the relief here was "limited in comparison to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 437. That in itself is sufficient to require a reduced fee award. *Id.* Nor can there be any question that the plaintiffs achieved only "partial or limited success," *id.* Under these circumstances, *Hensley* clearly establishes that full compensation for all hours expended on the litigation is *not* warranted, and a reduced fee is appropriate. As further emphasized in *Hensley*, *id.* at 436:

But had respondents prevailed on only one of their six general claims . . . a fee award based on the claimed hours clearly would have been excessive.

Given the similarly fractional success in this case, a fee award based on a full \$125/hr for 100% of the hours claimed was "clearly excessive" under *Hensley*.

Further, the *Hensley* ruling would mandate a reduction of the instant award even if (contrary to the fact) all the hours claimed had been "reasonably expended." *Id.* at 436. That is because full compensation for all hours worked is not always co-extensive with "reasonable attorney's fees" within the meaning of § 1988. As *Hensley* made clear, a limited or narrow success within the context of an ambitiously overbroad lawsuit does not justify compensation for all of the extensive attorney work-hours which are attributable in large part to the unsuccessful (or "non-prevailing") portions of the

case. Otherwise, the degree-of-success factor stressed so heavily in *Hensley* would have little or no meaning. Merely prevailing on a small fraction of the claims asserted would effectively guarantee full fee recovery for *all* hours claimed. Such a permissive approach encourages attorneys in civil rights cases to assert and pursue even the most farfetched and dubious claims, so long as their "core" claim is likely to prevail. Such a wasteful approach to litigation was never intended by Congress and should not be condoned by this Court.

The district court's disregard for this Court's *Hensley* ruling was equaled by that of the court of appeals. That court's opinion likewise curtly rejected the notion that attorney's fees under § 1988 must be reasonably proportional to the relief obtained. So hardened was the Ninth Circuit's position on this point that its opinion resorts to outright misstatement. The panel insisted, for instance, that (App. 1-8):

*The legislative history . . . lends no support to the proposition that there need be a relationship between the amount of damages awarded to the prevailing party and the amount of attorney's fees awarded.*  
[Emphasis added].

On the contrary, the legislative history lends strong and distinct support to the significance of the damages obtained as a factor limiting fee awards. The significance of the "results obtained" are stressed throughout the legislative history, and the House Report specifically emphasized "the amount received in damages, if any" as one of the five primary factors that must be considered in setting the fee award. H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 8 (1976). The foregoing unambiguous quote is only seven pages removed from the more generalized statement in the House Report cited and relied upon by the Ninth Circuit for the false proposition that the legislative history "lends no support" to the proportionality requirement. (App. at 1-8). The panel's



failure to identify or cite this critical passage on congressional intent does not reflect well upon the scholarly integrity of its opinion.

### III. THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS ON REMAND ARE INSUPPORTABLE ON THEIR FACE.

The court's rationalization of why extremely high fees were justified despite relatively modest damages only demonstrates the profound misconceptions and misunderstandings which produced this insupportable award. Thus, in its attempt to denigrate the disproportionality problem on remand, the district court offered the following curious analysis: (Finding of Fact No. 5, App. at 2-5) :

The jury awarded total damages of \$33,350. In the opinion of the Court, the size of the jury award resulted from (a) the general reluctance of jurors to make large awards against police officers, and (b) the dignified restraint which the plaintiffs exercised in describing their injuries to the jury. For example, although some of the actions of the police would clearly have been insulting and humiliating to even the most insensitive person and were, in the opinion of the Court, intentionally so, plaintiffs did not attempt to play up this aspect of the case.

Both of these considerations are legally irrelevant and logically invalid in terms of justifying the disproportionate fee award. Moreover, premise (a) regarding general jury practice in police brutality cases is demonstrably false.

First, the court was obviously "double-counting" in its efforts to contrive a justification. If (contrary to the facts, see *infra*) jurors were actually reluctant to award large damage awards in police brutality cases, that factor is already fully accounted for under the "Johnson" factors of "difficulty" and "undesirability" of the litiga-

tion. But the question of specific results achieved (which was the question presented by the remand) is an entirely separate and independent consideration. The "difficulty" and "undesirability" factors cannot be *re-cycled* to bolster the paltriness of the results or damages obtained. Only recently, this Court sharply admonished an attorney fee claimant under § 1988 for that very kind of "double counting" in attempting to justify excessive fees. *Blum v. Stenson*, 79 L.Ed. 2d 891, 902 (1984). Thus, the district court erred in justifying the disproportionate size of the fees by redundantly invoking the difficulty and delicacy of the case.

Further, the district court clearly erred in finding or assuming that there is a "general reluctance of jurors to make large awards against police officers." The court cited no authority to support this blithe generalization, and small wonder. Precisely to the contrary, the federal reporters are literally swollen with cases where *enormous* damage awards have been assessed in civil rights cases against police officers. *E.g.*, *Roman v. City of Richmond*, 570 F.Supp. 1544 (N.D. Cal. 1983) (\$3,000,000); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) (\$1,590,670); *Estate of Davis v. Hazen*, 582 F.Supp. 938 (C.D.Ill. 1983) (\$575,000 against police information clerk); *Herrera v. Valentine*, 563 F.2d 1220 (8th Cir. 1981) (\$300,000); *Smith v. Heath*, 517 F.Supp. 774 (D. Tenn. 1980) *aff'd*, 691 F.2d 220 (6th Cir. 1981) (\$132,000).

The most casual perusal of police brutality cases filed under the civil rights statutes reveals that six and seven figure awards are not at all uncommon and that awards in the range of \$100,000 are virtually routine. *See also Spears v. Conlisk*, 440 F.Supp. 490 (N.D. Ill. 1977) (\$100,000 assessed against a single police officer); *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) (\$100,000); *Stokes v. Del-*



*cambre*, 710 F.2d 1120 (5th Cir. 1983) (\$310,000 in punitive damages against local sheriff and deputy).

It was clearly erroneous, therefore, for the district court to find that "the size of the jury award resulted from . . . the general reluctance of jurors to make large awards against police officers," (App. 205). There is no such "general reluctance." Juries make very large awards against police officers on a routine basis. Since this clearly erroneous factual assumption was the primary basis for the court's refusal to reduce the award under the proportionality standard of *Hensley*, it is sufficient in itself to require reversal.

Moreover, any juror reluctance to award large damages against police officers as individuals would certainly not restrain them from approving large damages to be assessed against the City of Riverside. Again, the cases are legion where very large damages have been levied against cities, counties, and municipalities because of their employees' torts. (See cases cited *supra*). The district court erred again in failing to address this obvious consideration in its attempt to rationalize the modest damages award.

The court's curious emphasis on the "dignified restraint" supposedly exercised in presenting plaintiffs' case reflects similar confusion as to the issue at hand. The court's charge on remand was to reconsider its award in light of *Hensley's* pointed admonitions that "partial or limited success" and "limited relief" make reduced fees appropriate. In what can only be described as a judicial *non sequitur*, the district court responded by finding that the modest \$33,000 damage award is explainable by plaintiffs' "restraint" in describing their injuries. However admirable such "restraint" might have been, it has *absolutely nothing* to do with the question of whether the \$33,000 relief warranted a \$250,000 attorney's fee. The only possible relevance of this point is

its tendency to *diminish* counsel's claim to such a heroic fee. From a "result-oriented" standpoint, the "restrained" presentation may well have been a tactical error of counsel. In any event, this patently illogical rationalization of the disparity between damages and fee once again demonstrates the district court's clear failure to grasp the issues posed by *Hensley*. It utterly fails to provide lawful support for the excessive award.

In further characterizing the extent of plaintiffs' success, the court stated that the "central and most important issue in this case was whether there was police misconduct committed and condoned by defendants." (App. 2 at 2-6). The district court further held that, because plaintiffs established such misconduct to the satisfaction of the jury and court, they were automatically entitled to full-rate compensation for each and every hour they devoted to the case.

However, these findings go only to whether the plaintiffs were the "*prevailing party*", which is the essential prerequisite to receiving *any* fees at all under § 1988. But that is not in dispute now. It is the *magnitude* of the fees which is now in issue. And the fact that the plaintiffs prevailed on the basic issue of police misconduct *vel non* is simply not responsive on that issue.

Moreover, the court's statements fundamentally mischaracterize the very nature of litigation. The purpose of litigation is not merely to establish that some wrong has been done, but to provide remedy and redress for actionable legal wrongs. The establishment of police misconduct was only the first step in this litigation; establishing entitlement to a substantial remedy is the equally important second step. Therefore, the *magnitude* of the remedy is necessarily a crucial factor in assessing the *degree* of success for purposes of awarding sizeable attorney's fees. In curtly dismissing the significance of the magnitude of the remedy, the court committed further reversible error.

The district court's analysis also shows that it misunderstood the very concept of successful results as it relates to the amount of reasonable attorney's fees.

The court's dramatic characterization of the misconduct on which liability was based collides inconveniently with its simultaneous efforts to bolster the magnitude of counsel's achievement in securing any damages at all. Thus, the court described the police misconduct as "shocking" and "motivated by a general hostility to the Chicano Community." If this be so, then it is fair to ask why an "outstanding" level of representation was necessary to establish minimal liability and recover modest damages. If the police misconduct was truly "shocking", then it should not have taken great courtroom skill to persuade the jury in plaintiffs' favor. Moreover, given the sometimes extreme generosity of juries when presented with "shocking" misconduct by defendants (see police cases cited at p. 22, *supra*), the substantiality of the \$33,000 damage award is diminished all the more. In short, the district court simply cannot have it both ways on this point.

An additional fatal flaw in the district court's post-remand analysis concerns the shortcomings of the time records maintained by plaintiffs' counsel. In holding that there would be no reduction in the claimed fee based on unproductive or non-compensable time, the court stated as follows (App. 206, F. of F. 7):

The time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail.

This finding is transparently invalid. For example, the record shows that seventeen defendants prevailed on pre-trial motions for summary judgment. The claims against those seventeen were indisputably groundless; under the standards of Rule 56, F.R. Civ. P., there was

"no genuine issue as to any material fact" respecting their non-liability. Clearly, plaintiffs were entitled to no attorney's fees for the pursuit of those groundless and extraneous claims. And it is difficult to conceive that plaintiffs' counsel could not reasonably segregate the time devoted to the unsuccessful defenses against the summary judgment motions.

If counsels' recordkeeping was so cursory and slovenly as to fall short of even that minimal standard, counsel simply cannot be heard to complain of any fees he forfeits thereby. As stated in *Hensley v. Eckerhart*, *supra*, 461 U.S. at 437, "[T]he fee applicant bears the burden of . . . documenting the appropriate hours expended." As Chief Justice Burger further developed this point, *id.* at 440-41 (Burger, C.J., concurring) :

I read the Court's opinion as requiring that when a lawyer seeks to have his adversary pay the fees of the prevailing party, *the lawyer must provide detailed records of the time and services for which fees are sought.*

\* \* \* \*

[T]he party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed. [Emphasis added].

The district court's post-remand findings and conclusions not only ignore these admonitions, but flagrantly contradict them. Incredibly, the district court would require the defendant city to bear the enormous cost of plaintiffs' counsels' inadequate time-recording practices. That inequitable approach has been emphatically rejected by other circuits as well as by this Court in *Hensley*. *Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir. 1984); *Grendel's Den*, *supra*, 749 F.2d at 951-52. Like virtually everything else in its misbegotten opinion, this reasoning actively condones and encourages the very worst tend-

encies of unprincipled or undisciplined counsel. Unless this Court is to propagate the same kind of misguided policy, it should emphatically reject the district court's analysis in its entirety.

### CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed. The case should be remanded to the district court with instructions to reduce the fee award to a reasonable amount not exceeding the amount of damages recovered by the plaintiffs.

Respectfully submitted,

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No. 85-224

9

Supreme Court, U.S.  
FILED

DEC 19 1985

JOSEPH F. SPANIOL, JR.

**In the Supreme Court of the United States**

OCTOBER TERM, 1985

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CITY OF RIVERSIDE, ET AL., PETITIONERS

v.

SANTOS RIVERA, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
SUPPORTING PETITIONERS**

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## QUESTION PRESENTED

The United States will address the following question:

Whether, in a case that results solely in an award of money damages, a "reasonable attorney's fee" under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. 1988, should be reasonably related to the amount of damages received by the plaintiff.





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# **In the Supreme Court of the United States**

OCTOBER TERM, 1985

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No. 85-224

CITY OF RIVERSIDE, ET AL., PETITIONERS

*v.*

SANTOS RIVERA, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
SUPPORTING PETITIONERS**

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## **INTEREST OF THE UNITED STATES**

This case presents important recurring questions concerning the determination of the amount of attorneys' fees that may properly be awarded to a prevailing party under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. 1988. It is arguable that the United States itself may, in certain circumstances, be held liable for attorneys' fees under 42 U.S.C. 1988, by virtue of the Equal Access to Justice

Act, 28 U.S.C. 2412(b), which renders the government liable for attorneys' fees "to the same extent that any other party would be liable under the \* \* \* terms of any statute which specifically provides for such an award." Accordingly, the United States has a substantial interest in ensuring that fee awards are not excessive or contrary to Congress's intent. On the other hand, because private enforcement of the civil rights laws provides an important supplement to federal enforcement, the United States is vitally concerned that "fully compensatory fee[s]" (*Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)) be awarded in appropriate cases. The government's interest in striking the proper balance is not limited to cases arising under 42 U.S.C. 1988, because the Court's decision undoubtedly will affect the computation of attorneys' fees under other fee-shifting statutes as well (*Hensley*, 461 U.S. at 433 n.7).

### STATUTE INVOLVED

42 U.S.C. 1988 provides in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 *et seq.*], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

### STATEMENT

1. On August 1, 1975, City of Riverside police officers, using tear gas and physical force, broke up a party at a private residence and made several arrests (J.A. 177, 187-188). Among those arrested and



prosecuted were four of the respondents in this case, against whom charges were ultimately dismissed for lack of probable cause (*ibid.*). Respondents—eight Mexican-Americans involved in the August 1975 incident—brought this action on June 4, 1976, against petitioner City of Riverside, its chief of police, and 30 police officers (five of whom are petitioners here), alleging various constitutional and federal statutory civil rights violations and several pendent state common law torts (J.A. 177, 182 n.1).<sup>1</sup> By way of relief, respondents sought a declaratory judgment (Complaint 13), a preliminary and permanent injunction preventing “discriminatory harassment” and “discriminatory enforcement of the law” (*ibid.*), compensatory and punitive damages (*id.* at 14), and an award of attorneys’ fees and costs (*ibid.*). However, respondents did not press their claim for injunctive relief (J.A. 214).

2. On January 10, 1978, the district court, on motion for summary judgment, dismissed respondents’ claims against 17 of the police officers named as defendants in the complaint (J.A. 7-13). On September 16, 1980, following four years of discovery and two settlement conferences, the case went to trial before a jury over a period of nine days (*id.* at 177, 188). After seven days of deliberations, the jury returned verdicts in respondents’ favor on several of the civil

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<sup>1</sup> Specifically, respondents alleged that the defendants had violated the First, Fourth, and Fourteenth Amendments, and 42 U.S.C. 1981, 1983, 1985(3), and 1986. Respondents also set forth various state law claims based on allegations of conspiracy, emotional distress, assault and battery, property damage, breaking and entering, malicious prosecution, defamation, false arrest, false imprisonment, lost wages, and negligence (J.A. 182 n.1).

rights and common law claims against the City and in favor of five of the individual police officers remaining in the suit on all claims (*id.* at 166-171). Specifically, the jury found that the City and three of the officers had violated 42 U.S.C. 1983 in 11 instances and awarded a total of \$13,300 in compensatory and punitive damages for those civil rights violations (J.A. 166-171).<sup>2</sup> In addition, the jury found that the City and five of the officers (including the three mentioned above) had committed 26 acts of common law negligence, or false arrest and false imprisonment, and awarded a total of \$20,050 in compensatory (and, in only one instance, punitive) damages (*ibid.*). Thus, the jury verdicts against the City and five individual police officers amounted to a combined total of \$33,350 in damages (*ibid.*; *id.* at 177).

3. On December 1, 1980, respondents moved for an award of attorneys' fees and costs under 42 U.S.C. 1988 (J.A. 14-64). Respondents objected on numerous grounds (*id.* at 65-123), various supplemental pleadings were filed (*id.* at 124-165), and the matter came on for hearing in the district court on January 19, 1981 (*id.* at 166, 173). On April 7, 1981, the court entered its decision on the attorneys' fees matter (*id.* at 173-175). Respondents had sought compensation for their attorneys at a rate of \$125 per hour for 1,946.75 hours, and for their law clerks at a rate of \$25 per hours for 84.50 hours, for a total of \$245,456.25—all of which the district court found to be reasonable (*id.* at 174-175).<sup>3</sup> Accordingly, the

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<sup>2</sup> Respondents' Section 1983 claims were the only federal claims submitted to the jury. Br. in Opp. 2 n.1.

<sup>3</sup> Respondents had also sought reimbursement for various out-of-pocket costs (J.A. 62-64) and a multiplier of the regular attorneys' fees by a factor of two, in order to "encourage

district court entered an award of \$245,456.25 for respondents on their attorneys' fees claim (*id.* at 175).

Petitioners appealed only the attorneys' fees award, and the court of appeals upheld the award in its entirety (J.A. 176-183; 679 F.2d 795). Petitioners then sought review in this Court, which, on May 31, 1983, granted certiorari, vacated the judgment below, and remanded the case for further consideration in light of *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (J.A. 184; 461 U.S. 952).

On remand, the district court, on July 26, 1984, issued a new opinion readopting the original attorneys' fees award in its entirety (J.A. 185-192). Citing this Court's decision in *Hensley*, however, the district court this time stated that the number of hours claimed by respondents' counsel and the amount of the fee award were reasonable in view of the level of success achieved by the litigation (*id.* at 192). Petitioners again appealed, and the court of appeals again upheld the award of attorneys' fees, stating without elaboration that "the district court correctly reconsidered the case in light of *Hensley*" and "the fee award is reasonable" (*id.* at 194). On August 28, 1985, Justice Rehnquist, acting as Circuit Justice, issued an order granting petitioners' application for a stay of the court of appeals' mandate (No. A-122).

#### INTRODUCTION AND SUMMARY OF ARGUMENT

The computation of a "reasonable" attorneys' fee under 42 U.S.C. 1988 must serve two difficult and sometimes conflicting masters in each of the myriad

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other attorneys to represent low income plaintiffs in important civil rights cases on a contingent fee basis" (*id.* at 43). The district court rejected these requests (*id.* at 175, 182 n.3).

cases for which a fee award can be made. On the one hand, the fee award must be adequate to ensure that plaintiffs with meritorious civil rights claims will be able to attract competent counsel; on the other hand, the award must not be so generous as to unjustly enrich a plaintiff's attorney at the defendant's expense. In computing a fee award, therefore, the amount recovered by the plaintiff in damages is an important consideration for the courts to assess, but it is not the only one. In cases involving injunctive relief, or an award of damages that has the same effect as an injunction, or an award of nominal damages, strict use of the amount of damages recovered by a plaintiff to cap an attorneys' fee award might not sufficiently compensate a lawyer and therefore might not be adequate to ensure that plaintiffs can obtain adequate representation. However, in other cases, such as this one, which can fairly be characterized as a suit brought essentially for the monetary benefit of the individual plaintiffs involved, an award of attorneys' fees that exceeds or approximates the damages recovery would overcompensate plaintiffs' attorneys and thereby disserve Congress's other equally-important goal. We submit that in the latter category of cases a fee that exceeds or approximates the damages obtained by the plaintiff is presumptively unreasonable and that the lower courts plainly erred in upholding the award in this case.

1. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Blum v. Stenson*, No. 81-1374 (Mar. 21, 1984), this Court ruled that the product of the number of hours reasonably expended on a case and a reasonable hourly rate is a presumptively reasonable attorneys' fee under Section 1988. The Court recognized, however, that this figure would have to be adjusted in some cases, and this case is one such exception. Be-

cause few reasonable plaintiffs would be willing to pay their counsel more than they hope to recover in damages, the lodestar does not provide a reliable guide to the calculation of a reasonable attorneys' fee where it exceeds or approximates the plaintiff's damages recovery. In those circumstances, the lodestar produces a presumptively *unreasonable* fee that should be adjusted downward. A downward adjustment is also necessary to ensure that civil rights plaintiffs, not their attorneys, will be the primary beneficiaries of Section 1988.

2. The lower courts erred by failing to consider whether the prevailing contingent fee rate would provide the appropriate method of calculating the fee award. Given the nature of the constitutional and common law tort claims that respondents presented, an attorney who handles personal injury claims may well provide the type of "similar services" (*Blum v. Stenson*, No. 81-1374 (Mar. 21, 1984), slip op. 8 n.11) in the private bar that can be used as a comparison, and the prevailing contingent fee rate may well represent the appropriate measure of compensation. A contingent fee approach would not prevent plaintiffs with meritorious claims from obtaining counsel where, as here, the potential damages recovery is sufficiently large to provide adequate compensation. This approach also ensures that attorneys handling fee claims would not be more handsomely compensated than other lawyers in the private sector, a result that Congress did not intend.

3. Nothing in the opinions below suggests that there is any reason for treating this case in a different fashion. More than half of the original defendants were dismissed from this suit on summary judgment or were found not liable by the jury; the plain-



tiffs received only an award of damages; no injunction was entered; and neither the City nor the police department was forced to modify a longstanding policy or custom. In sum, nothing in the opinions below suggests that this suit constitutes anything more significant than what it appears to be on the surface: a constitutional and state law tort suit seeking damages as a result of a single incident.

### ARGUMENT

#### **A REASONABLE ATTORNEYS' FEE IN AN ACTION LIMITED SOLELY TO MONETARY RELIEF SHOULD TAKE INTO ACCOUNT THE PREVAILING CONTINGENT FEE RATE FOR PERSONAL INJURY CLAIMS**

##### **A. By Relying Exclusively On The "Lodestar" Approach To Compute An Award Of Attorneys' Fees In This Case, The Lower Courts Reached The Anomalous Result That Respondents' Counsel Would Be More Highly Compensated Than Respondents Themselves**

1. The Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. 1988, authorizes the courts to award a prevailing plaintiff "a reasonable attorney's fee" in suits brought under certain federal civil rights laws. In that Act, Congress modified the traditional "American Rule," under which each party to civil litigation must generally bear its own legal fees (see *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)), to ensure that "civil rights plaintiffs obtain 'effective access to the judicial process.'" *Marek v. Chesny*, No. 83-1437 (June 27, 1985), slip op. 8 (citations omitted). To provide the courts with guidance for computing a "reasonable" attorneys' fee that is faithful to that principle, but avoids unjustly enriching plaintiffs' attorneys at a defendant's expense, Congress identified the touchstone for calculat-

ing a "reasonable" fee in the following terms: "fees [should be] adequate to attract competent counsel, but [should] not produce windfalls to attorneys." S. Rep. 94-1011, 94th Cong., 2d Sess. 6 (1976) [hereinafter cited as *Senate Report*]; see also H.R. Rep. 94-1558, 94th Cong., 2d Sess. 9 (1976) [hereinafter cited as *House Report*] (fee awards should be sufficient "to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys").

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Blum v. Stenson*, No. 81-1374 (Mar. 21, 1984), this Court adopted a basic formula for computing an attorneys' fee award. The initial step is to calculate what has been termed the "lodestar" figure<sup>4</sup> by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Hensley*, 461 U.S. at 433.<sup>5</sup> That figure "is presumed to be the reasonable fee contemplated by § 1988." *Blum*, slip op. 10. The lodestar may then be adjusted in either direction based chiefly upon the court's assessment of the degree of success the plaintiff obtained. *Smith v. Robinson*, No. 82-2120 (July 5, 1984), slip op. 13-22; *Blum*, slip op. 10-14; *Hensley*, 461 U.S. at 437. Because "[d]ue regard must be paid, not only to the fact that a plaintiff 'prevailed,' but also the relation-

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<sup>4</sup> See, e.g., *Lynch v. City of Milwaukee*, 747 F.2d 423, 426 n.1 (7th Cir. 1984); *Copeland v. Marshall*, 641 F.2d 880, 890-891 (D.C. Cir. 1980) (en banc).

<sup>5</sup> The Senate and House Reports refer to the factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), as matters to be considered in computing a fee award (see *Senate Report* 6; *House Report* 8), but most of these considerations will be subsumed within the calculation of the lodestar. *Hensley*, 461 U.S. at 433-434 & n.9.



ship between the claims on which effort was expended and the ultimate relief obtained" (*Smith*, slip op. 13), "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained" (*Hensley*, 461 U.S. at 440). On the other hand, "an enhanced award may be justified 'in some cases of exceptional success'" (*Blum*, slip op. 10), because the basic standard of reasonable rates multiplied by reasonably expended hours may result in a fee that is "unreasonably low" (*ibid.* (citation omitted)).

A variety of factors are material to the second step of the analysis required by *Hensley*, but not every factor is relevant in every case. The dollar amount of a plaintiff's damages award may provide a good benchmark in a case resulting solely in an award of damages, but will obviously provide no assistance where the only relief awarded was a declaratory judgment or an injunction. By the same token, the entry of an injunction may be independently significant even in cases where damages are awarded, given the stringent criteria that a plaintiff must satisfy to obtain injunctive relief (see, *e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)). (Of course, the absence of an injunction is significant as well, because it demonstrates that the violations found by the court or the jury are unlikely to recur.)<sup>6</sup> And even where damages are the sole relief the plaintiff obtains, there may be other circumstances, not reflected in the damages award, demonstrating that the case involved far

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<sup>6</sup> However, whether an injunction has been entered should not be the sole criterion for measuring the reasonableness of the lodestar, even where injunctive relief can be obtained, since that would needlessly encourage the parties to seek such relief, thereby adding unnecessarily to the litigation.

more than the resolution of individual grievances against isolated instances of unlawful behavior by state or local officials. For example, a nominal damages award may bring a halt to an unconstitutional policy or custom that was previously endorsed by the defendant and thereby vindicate the rights of the public at large as well as the specific plaintiff (see *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 691-692, 694 (1978)); in such a case, an award of attorneys' fees greater than nominal damages might be necessary to ensure that the plaintiff could obtain counsel. In short, the inquiry should take into account whether the relief awarded to the plaintiff vindicated simply his own injuries or rectified a broader or persistent pattern or practice of misconduct that would perforce benefit the public as well.

2. This case does not involve a challenge to the conditions of confinement in a state prison, segregated conditions of a school system, or a pattern and practice of police misconduct; nor does this suit involve a claim for relief for which only nominal damages could be awarded. Rather, respondents sought an award of substantial compensatory and punitive damages and injunctive relief based on a variety of constitutional and common law tort theories. However, respondents did not pursue their claim for injunctive relief, and the only relief that respondents received was a damages award, the bulk of which was based on their state law torts, not their constitutional claims. No injunction was entered against any of the defendants,<sup>7</sup> and nothing in the lower courts' opinions sug-

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<sup>7</sup> Although the district court stated at a hearing that it would have granted an injunction against some of the defendants had respondents asked for one (J.A. 219), the court made no findings of the type necessary to support injunctive

gests that the judgment caused the City or its police force to restructure its operations in any manner that would benefit the public in general. In sum, it is fair to say—without in any sense denigrating the importance of the litigation—that this case involved a tort suit brought essentially for the monetary benefit of the individual plaintiffs whose rights were violated.

Nevertheless, the lower courts concluded that an attorneys' fee award of \$245,456.25 was "reasonable" even though 17 of 32 defendants were dismissed prior to trial, nine of the remaining individual defendants were found not liable at trial, respondents obtained no relief beyond an award of damages, the total award of damages was only \$33,350, and only \$13,300 of that award (40% of the total) was attributable to respondents' civil rights claims. The fee award was therefore more than seven times greater than the total award of damages and more than 18 times greater than that portion of the damages award attributable to the civil rights claims for which Congress authorized the courts to award attorneys' fees.

That result cannot be squared with any conceivable notion of a "reasonable" attorneys' fee. Assuming *arguendo* that the district court's findings were sufficient under *Hensley* for the purpose of deciding whether all of the hours claimed by respondents' counsel in this case were "reasonable" (an assumption

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relief. See *City of Los Angeles v. Lyons*, *supra*; *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Rizzo v. Goode*, 423 U.S. 362 (1976). Moreover, although the City was found liable under 42 U.S.C. 1983, the district court—which entered its judgment prior to this Court's decision in *City of Oklahoma City v. Tuttle*, No. 83-1919 (June 3, 1985)—did not find that respondents had proven that a City "custom" or "policy" was unlawful.

that we are unwilling to accept, but that we will not contest here), that court's reliance upon a general hourly rate for the legal services provided by for-profit counsel produced the extraordinary result that respondents' counsel received a fee award seven times greater than respondents' total damages award.<sup>8</sup> It goes without saying that few reasonable plaintiffs would be willing to pay their attorneys more than they hope to recover in damages in a case of this type and that any approach to the computation of a fee award that fails to consider this factor does not adequately represent the actual workings of the private market for legal services. See *Jaquette v. Black Hawk County*, 710 F.2d 455, 460 (8th Cir. 1983) ("common sense dictates that in a property damage suit few clients would find it reasonable to expend \$100,000 to achieve a recovery of money damages not to exceed \$1,500").<sup>9</sup>

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<sup>8</sup> The court of appeals also is not blameless in this regard. That court engaged in a perfunctory review of the district court's rather conclusory analysis in the teeth of some quite substantial arguments that the district court altogether abnegated its responsibilities not only under *Hensley* but also under this Court's remand order. (For instance, it is implausible that all the 45.5 hours of "stand-by" time spent by one of respondents' counsel awaiting the jury's verdict was "reasonable," especially since respondent's other counsel, who was on the faculty at a Los Angeles area law school (J.A. 119), seems to have been at hand.). Other courts of appeals have not hesitated to reduce excessive fees. See, e.g., *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984). The court of appeals should have done the same here.

<sup>9</sup> Most of the courts of appeals have ruled that the size of the underlying money judgment is a relevant consideration in computing a fee award. See *Nephew v. City of Aurora*, 766 F.2d 1464, 1466-1467 (10th Cir. 1985); *Lynch v. City of*

The same point can be made in a different way. If Congress had adopted a statute forbidding lawyers from charging more than a "reasonable" fee for their services in civil rights cases (cf. 28 U.S.C. 2678; 42 U.S.C. 406(b)(1)), certainly few persons (and very few plaintiffs) would maintain that a fee seven times greater than a plaintiff's tort recovery was "reasonable." But there should be no difference between that situation and this one, because 42 U.S.C. 1988 only shifts the burden of paying attorneys' fees from a successful plaintiff to an unsuccessful defendant and does not modify the definition of a "reasonable" fee based simply on the identity of the party who must pay it. A disproportionate fee is no less unreasonable simply because the losing party must foot the bill.

Indeed, the disproportionate award of attorneys' fees in this case is directly contrary to Congress's belief that plaintiffs' attorneys would not be the primary beneficiaries of Section 1988. In the words of Senator Tunney, the initial sponsor of the bill (S. 2278, 94th Cong., 2d Sess. (1976)) that ultimately became 42 U.S.C. 1988, "[i]f any relief is accorded by the passage of this bill, it will be granted to those

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*Milwaukee*, 747 F.2d at 428 n.5; *Wojtkowski v. Cade*, 725 F.2d 127, 131 (1st Cir. 1984); *Jaquette v. Black Hawk County*, 710 F.2d at 459-461; *Bonner v. Coughlin*, 657 F.2d 931, 934-935 (7th Cir. 1981); *Perez v. University of Puerto Rico*, 600 F.2d 1, 2 (1st Cir. 1979); *Burt v. Abel*, 585 F.2d 613, 618 (4th Cir. 1978); see also *Scott v. Bradley*, 455 F. Supp. 672, 675 (E.D. Va. 1978). But see *Di Filippo v. Morizio*, 759 F.2d 231 (2d Cir. 1985); *Cunningham v. City of McKeesport*, 753 F.2d 262 (3d Cir. 1985), petition for cert. pending, No. 84-1793. In *Nephew*, the Tenth Circuit distinguished (as dictum) and disapproved language in an earlier decision—*Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983)—that had taken a contrary view. See 766 F.2d at 1465-1466.



individuals who have been unlawfully deprived of their constitutional rights." 122 Cong. Rec. 32185 (1976).<sup>10</sup> Representative Drinan, a principal sponsor

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<sup>10</sup> The congressional hearings laying the groundwork for the civil rights attorneys' fee bill must have left Congress with the impression that the fee measure to be drafted would not create a favored class of civil rights litigators. As one witness explained (*Awarding of Attorney's Fees: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 227 (1975) [hereinafter cited as *House Hearings*] (testimony of Philip J. Mause)):

I do not think I have seen anyone writing in this area who contemplates the situation in which Covington & Burling simply sends its bill to the losing party in a case in which its client won. I think the judge would have to retain some discretion to determine the degree to which the fees were reasonable.

See also *The Effect of Legal Fees on the Adequacy of Representation: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 949-1024 (1973) [hereinafter cited as *Senate Hearings*] (Mary Frances Derfner, Lawyer's Committee for Civil Rights Under law) (digest of decisions in civil rights cases in which the courts, prior to *Alyeska*, awarded, discussed, or denied attorneys' fees). This digest of cases reveals that, as of 1973, the typical attorneys' fee award in civil rights cases was in the range of \$350 to \$5,000. Only four out of the 30 fee examples provided were higher than that amount. Significantly, in two of the cases cited, the courts refused to award the fee amounts requested by counsel because awards of that magnitude would have been disproportionate to the damages obtained as a result of the litigation (*id.* at 953, 967-968). See *Brown v. Ballas*, 331 F. Supp. 1033, 1037 (N.D. Tex. 1971); *Lyle v. Teresi*, 327 F. Supp. 683, 686 (D. Minn. 1971). Although these hearings preceded the Court's decision in *Alyeska*, they are cited in the Senate Report as a basis for adopting the bill that became 42 U.S.C. 1988. See *Senate Report* 2.

of the bill in the House (*Maine v. Thiboutot*, 448 U.S. 1, 9-10 (1980)), made the same point, stating that the "bill is not intended \* \* \* to allow lawyers \* \* \* to recover unjustly from a defendant." 122 Cong. Rec. 35124 (1976). In fact, a prominent concern that surfaced during the floor debate over the bill was that it would prove to be something of a "Civil Rights Attorneys Relief Act" that would "guarantee large fees to attorneys." *Id.* at 31850 (Sen. Allen); see, e.g., *id.* at 32394 (Sen. Helms); see also *id.* at 35117 (Rep. Hyde). However, Senator Kennedy, a chief sponsor and the Senate floor manager of the bill, sought to lay such concerns to rest by explaining that "[w]e are not talking about the kind of attorneys' fees that were included in the antitrust bill. You do not get rich from protecting civil rights of citizens \* \* \*. And the determination of fees is left, in any event, to the discretion of the courts" (*id.* at 31851).<sup>11</sup> It is therefore plain that Congress intended that the goal of avoiding "windfalls for attorneys" (*Senate Report* 6; *House Report* 9) would play as prominent a role in the calculation of a fee award as the goal of encouraging plaintiffs to bring meritorious civil rights suits.

3. The explanation for the startling award to respondents' counsel is that the lower courts misconstrued the guidelines for computing a reasonable at-

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<sup>11</sup> See also *id.* at 33314 (Sen. Kennedy) (the act is not "a relief fund for lawyers"; "this bill is not for the purpose of aiding lawyers"); *id.* at 32185 (Sen. Tunney) (the bill was not intended to "grant[] relief to attorneys"; no "single case of a lawyer getting rich on civil rights cases"); *id.* at 35127 (Rep. Jordan) ("[t]his is not a bill that we could term a food-stamp bill for lawyers"; "[i]t is not going to work that way").



torneys' fee established by this Court in *Hensley* and *Blum*. Although both decisions emphasized that the lodestar should produce a presumptively reasonable attorneys' fee, the Court nevertheless recognized that this would not always be the case and that the lodestar might have to be adjusted to ensure that a particular fee award was proper. See *Hensley*, 461 U.S. at 434-440; *Blum*, slip op. 9-10. In computing the fee award in this case, the district court erred by failing to complete this step in the process. Where, as here, a judgment consists solely of compensatory and punitive damages, we submit that any lodestar figure that approximates or exceeds the amount of those damages is presumptively *unreasonable* and must be closely scrutinized by the courts.

In this case, the district court found that the requested rate of \$125 per hour for every hour spent by respondents' counsel was reasonable (J.A. 190), even though the resulting fee was wildly disproportionate to the damages that respondents obtained. In awarding respondents' counsel \$245,456.25 for receiving a \$33,350 judgment, the district court ignored or overlooked the salient fact that no attorney would ever bill his client in that manner. Moreover, and more important, the court's mindless adherence to the lodestar approach gave no consideration to the fact that the generally prevailing contingent fee schedule in the relevant legal community might well provide a more appropriate standard for determining a "reasonable" fee award for respondents' counsel in these circumstances. The failure to undertake this inquiry, in our view, was inconsistent with the Court's ruling in *Blum* that a court must examine the fee schedule established in the relevant legal community for "similar services" (*Blum*, slip op. 8 n.11).

**B. The Prevailing Contingent Fee Rate For Personal Injury Suits May Often Provide The Best Means Of Computing A Reasonable Fee For Claims Resulting Solely In Monetary Damages**

1. In *Blum v. Stenson*, *supra*, the Court addressed the issue of how the appropriate dollar amount of attorneys' fee awards under 42 U.S.C. 1988 should be calculated. The precise question before the Court was whether use of the prevailing market rates charged by for-profit attorneys to compute a fee award would lead to exorbitant fees and provide windfalls for attorneys employed by nonprofit legal aid organizations. Because such organizations incur lower operating expenses and, by definition, do not charge their clients a fee that includes an element of profit for the attorneys handling their litigation, it was argued that a cost-based approach was the only means of ensuring that legal aid attorneys would be adequately compensated for their efforts but would not receive a windfall at a defendant's expense. See *Blum*, slip op. 5 & n.6. However, after examining the legislative history of the Act, the Court ruled that Congress intended the courts to refer to the prevailing market rate in the relevant legal community regardless of whether a prevailing plaintiff was represented by private counsel or by a nonprofit legal services organization. Slip op. 5-8.

In so ruling, the Court recognized that determining an appropriate market rate for legal services was inherently difficult, given the diversity in the services offered by lawyers, their different experience, skills, and reputation, and the fact that an ex post calculation of a reasonable fee was an inexact means of resolving a matter that a lawyer normally negotiates with his client before representation is undertaken. *Blum*, slip op. 8 n.11. However, the Court found that

the inquiry was not altogether unmanageable because "the rates charged in private representations may afford relevant comparisons" (*ibid.*). The Court also endorsed a standard requiring a prevailing party to demonstrate that the sought-after rates "are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation," which the Court, "for convenience," termed "the prevailing market rate." *Ibid.* That standard, the Court assumed, was consistent with Congress's intent that attorneys' fee award would allow plaintiffs with meritorious claims to retain competent counsel, but would not unfairly enrich plaintiffs' attorneys at an unsuccessful defendant's expense. See *id.* at 6, quoting *Senate Report* 6.

Application of that standard in any given case can be a complex undertaking where counsel lacks an historic billing rate.<sup>12</sup> That complexity, *Blum* noted, stems largely from the lack of a generally prevailing market rate for legal services and the differences among attorneys in factors such as skill and experience. However, the difficulty in computing the appropriate "market rate" may be tempered in some instances where there is a separate "market" in the private bar that can serve as a rough approximation to the type of case at hand. In some instances, employment discrimination cases for example, the for-profit bar may also litigate such cases and may have generally prevailing rates that can be used as the basis for calculating a reasonable attorneys' fee under the Act. In other cases, such as a school desegregation lawsuit, there may be no precise parallel in the market.

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<sup>12</sup> See *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 16-17 (D.C. Cir. 1984), cert. denied, No. 84-1655 (June 17, 1985).

Given the diversity of claims that may be brought under the statutes for which Section 1988 authorizes a fee award, especially 42 U.S.C. 1983, the determination of what types of legal services are necessary to represent a particular plaintiff, and thus what types of private legal services are "similar," may vary according to particular issues presented by the case. The different types of legal services rendered by lawyers may therefore lead to varying results in the calculation of the "prevailing market rate" depending on the relevant market used. By requiring the courts to look to the prevailing market rates for "similar services," however, *Blum* recognized that balancing the goals of ensuring adequate representation for civil rights plaintiffs, but not providing overcompensation for their counsel, should take these differences into account to the extent feasible.

2. a. Properly viewed, this case presents few of the complications that can potentially arise in the calculation of the prevailing market rate for comparable legal services, because this case allows that determination, and an appropriate downward adjustment, to be made without undue difficulty.

The material facts are simple and straightforward. As noted above, respondents sought and obtained a damages award for their constitutional and pendent state law torts, but they obtained no broader form of relief. In these circumstances, the appropriate market rate for the "similar services" provided by for-profit attorneys (*Blum*, slip op. 8 n.11) would be the contingent fee rate that is used in the relevant legal community for personal injury suits.<sup>13</sup> Given the

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<sup>13</sup> We use the term "contingent fee" rate in its commonly-understood sense that typically describes the arrangement in

nature of the claims respondents presented, the "personal injury bar" provides the relevant submarket for this case because it provides services "similar" to those involved here. The generally applicable contingent fee rate used by attorneys who represent similar plaintiffs in comparable types of litigation should then accurately reflect the appropriate market rate for the legal services provided to respondents.<sup>14</sup> Indeed, had respondents pursued only their state law tort claims, a lawyer is likely to have used precisely this rate to charge respondents for representing them.

The fact that respondents presented constitutional claims in addition to their state law tort claims does not call for a radically different conclusion. It is well settled that Section 1983 "creates a species of tort liability" (*Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)), and that "[Section] 1983 claims are best characterized as personal injury actions" (*Wilson v. Garcia*, No. 83-2146 (Apr. 17, 1985)). Moreover, the purpose of an award under Section 1983 is "to compensate persons for injuries that are caused by the deprivation of [their] constitutional rights" (*Carey v. Piphus*, 435 U.S. 247, 254 (1978)), which

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"plaintiffs' tort representation." *Copeland*, 641 F.2d at 893. The term "contingency" has also been used to refer to adjustments to the lodestar to compensate for the possibility at the outset of litigation that the plaintiff will be unsuccessful. Whether such multipliers are permissible is the issue before the Court in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, cert. granted, No. 85-5 (Oct. 7, 1985).

<sup>14</sup> The contingent fee award would be computed on the basis of both the compensatory and punitive damages obtained by respondents. By including the punitive damages award as part of the basis, the contingent fee rate should more than adequately compensate respondents' counsel.



is precisely the purpose served by a common law damages award (*id.* at 254-255 (“[t]he cardinal principal of damages in Anglo-American law is that of *compensation* for the injury caused to [the] plaintiff by defendant’s breach of duty”), quoting 2 F. Harper & F. James, *The Law of Torts* § 25.1, at 1299 (1956) (emphasis in original)). As the Court explained in *Carey*, “[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.” 435 U.S. at 254. Accordingly, since the “purpose” served by the Fourth Amendment—to protect against the arbitrary invasion of one’s liberty and property (see, *e.g.*, *Maryland v. Macon*, No. 84-778 (June 17, 1985), slip op. 5)—“protect[s] persons from injuries” to essentially the same type of “interests” as do the various state law torts that respondents’ also alleged in their complaint, there is every reason to treat respondents’ constitutional tort claims in the same manner as their analogous state law claims. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 408-409 (1971) (Harlan, J., concurring in the judgment).<sup>15</sup>

b. This approach is consistent with the purposes underlying 42 U.S.C. 1988. Congress adopted the act to “encourage[] plaintiffs to bring meritorious civil rights suits.” *Marek v. Chesny*, slip op. 9. The prospect of recovering \$11,000 for representing plaintiffs in a damages suit (assuming a contingency rate

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<sup>15</sup> In this case, it is no answer that a contingent fee approach should not be considered because “the rights involved may be non-pecuniary in nature” (*Senate Report* 6; see *Br. in Opp.* 22), since the rights involved in this case can be represented in pecuniary terms, as the verdicts show.

of 33%) is likely to attract a substantial number of attorneys. At the same time, it is not inconsistent with Congress's intent to allow the private bar in a case such as this one to make the estimate whether plaintiffs' claims are "meritorious," because that is precisely the function that lawyers serve in the marketplace.

Moreover, there is no indication that Congress intended that civil rights plaintiffs should have a completely risk-free opportunity to litigate their claims. On the contrary, Section 1988 retained the historic requirement that a plaintiff establish that he is a prevailing party to recover any fee award at all. See *Senate Report* 1, 5; *House Report* 6-8; *Hensley*, 461 U.S. at 433; *Hanrahan v. Hampton*, 446 U.S. 754 (1980); see generally *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684-685 (1983).<sup>16</sup> In addition, a plaintiff who makes this showing has merely crossed "the statutory threshold" (*Hensley*, 461 U.S. at 433) and must also demonstrate that his fee request is "reasonable." The two-step process adopted by the Court in *Hensley* for computing a presumptively reasonable fee emphasizes the extent to which the plaintiff has

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<sup>16</sup> Accord 122 Cong. Rec. 33314 (1976) (Sen. Kennedy) (lawyer's "fee is contingent not only upon his success, but also upon the discretion of the judge before whom he appears"); *House Hearings* 8 (Rep. Sieberling) (the bill "certainly is not calculated to promote the interests of lawyers who make the wrong judgment or who make an ineffective presentation or who are on the wrong side of a lawsuit"); *id.* at 166-167 (testimony of Peter A. Schuck, Consumers Union) (the bill "does not subsidize public interest groups. It does not give them generalized support for activities, some of which Congress may support and some of which Congress may not. But, as I say, it targets it [attorney's fees] to a particular objective, upon which Congress has spoken").



been successful. See *Smith v. Robinson*, slip op. 13-22; *Blum*, slip op. 10-14; *Hensley*, 461 U.S. at 434-440.<sup>17</sup> This is so, *Hensley* explained, even where “the plaintiff’s [unsuccessful] claims were interrelated, nonfrivolous, and raised in good faith,” because “Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill” (*id.* at 436). The “most critical factor” in determining a reasonable fee is always “the degree of success obtained.” *Ibid*; cf. *Marek v. Chesny*, slip op. 8 (requiring civil rights plaintiffs “to ‘think very hard’ about whether continued litigation is worthwhile” by applying Fed. R. Civ. P. 68 is not inconsistent with Section 1988, given the Act’s emphasis on the degree of success obtained).

Relying on the prevailing contingent fee rate, where the lodestar produces a fee disproportionate to the results obtained, also ensures that attorneys who represent civil rights plaintiffs will not be more handsomely compensated than attorneys who represent other types of civil litigants, which Congress did not intend. The standards Congress identified as a guide for computing a reasonable fee make that point. For instance, Congress referred the courts to the 12 factors discussed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), that were

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<sup>17</sup> As Justice Rehnquist noted in granting a stay of the mandate in this case (No. A-122, slip op. 5), it is significant that the House Report, in citing the *Johnson* factors for guidance in determining a “reasonable” fee, chose to highlight a key consideration under this eighth factor—“*the amount received in damages, if any.*” No. A-122, slip op. 5 (quoting *House Report* 8 (emphasis in opinion)). *Hensley* also repeatedly underscored the importance of the extent of a plaintiff’s success in determining a reasonable attorney’s fee. See 461 U.S. at 434-440.

derived from the provisions of the American Bar Association's Code of Professional Responsibility governing the determination of a permissible fee for retained counsel. See *House Report* 8; *Senate Report* 6; *Hensley*, 461 U.S. at 429-430 & n.3.<sup>18</sup> Congress also cited three district court decisions said to "correctly appl[y]" the *Johnson* standards in fixing a fee award (*Senate Report* 6), and each case calculated a fee award by reference to the prevailing market rate for legal services. See *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 682 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 Fair Empl. Prac. Cas. 244 (C.D. Cal. 1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483, 486 (W.D.N.C. 1975).

This Court's decision in *Hensley* also emphasized that the "billing judgment" traditionally exercised by counsel in private practice cannot be dispensed with under Section 1988 merely because the opposing party must foot the bill. See 461 U.S. at 434, 437; *id.* at 441 (Burger, C.J., concurring) (in private practice, the client who is presented with a bill by his own attorney ordinarily has reason for "confidence that his lawyer has exercised the appropriate 'billing judg-

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<sup>18</sup> Those factors are as follows (488 F.2d at 717-719; see also *Hensley*, 461 U.S. at 430 n.3):

- (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

ment' "). On the contrary, any time that is "excessive, redundant, or otherwise unnecessary" or that, in general, fails to reflect " 'billing judgment,' " must be excluded since " '[h]ours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.' " 461 U.S. at 434, quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (emphasis in original). In sum, the standards and billing practices that for-profit attorneys in the market would use should be considered in calculating a reasonable fee award under the Act.

Under the district court's approach, by contrast, the concerns expressed by some legislators in opposition to passage of Section 1988 would have been well-founded. Despite the repeated assurances of the bill's chief sponsors that Section 1988 was designed to benefit persons with meritorious civil rights claims and not to enrich their counsel, the Act would overcompensate attorneys who handle fee cases and, in some instances, allow attorneys to collect fees that bear little or no relation to the actual worth of the services performed for their clients. No "billing judgment" would have to be exercised by such attorneys, because they would be compensated for all of their time spent on a case in which their clients achieved some measure of success, even if the time they devoted to the case was wholly out of proportion to the results obtained on their client's behalf. Congress plainly did not intend that Section 1988 would operate in this fashion, and this Court has already made clear that the Act should not be permitted to serve as a vehicle for the award of excessive fees. *Hensley*, 461 U.S. at 440.

c. It is also important to note that any damages recovery stemming solely from state law tort claims

should not be included in this determination. Congress authorized the courts to award attorneys' fees only in "any action or proceeding to enforce a provision of" specified federal laws. Section 1988 does not provide that fees may be awarded on the basis of pendent state law claims, and its legislative history does not suggest that Congress sought to require defendants to underwrite the litigation of their adversaries' state law tort claims by awarding attorneys' fees for the time, expenses, or risks associated with such claims. Therefore, including a plaintiff's damages recovery for state law torts would artificially inflate a fee award in a manner Congress did not intend.

3. To summarize, although the lodestar should presumptively constitute a reasonable fee, there will be cases in which this is not true, and some adjustment must be made. Specifically, where the lodestar exceeds or approximates the damages recovered by a plaintiff in a case resulting solely in that form of relief, the lodestar produces an unreasonable fee and should be reduced. In modifying such an award in light of the results obtained, a court should consider the prevailing contingent fee rate in the relevant legal community, which, in a case seeking relief for constitutional and common law torts, should provide an appropriate guidepost for computing the market value of the services provided by plaintiffs' counsel.

Nothing in the opinions below discloses any circumstance that would justify a deviation from that approach here. At the outset of this litigation, respondents sought broad declaratory and injunctive relief, as well as damages, against the City, its chief of police and 30 police officers for civil rights violations and common law torts. After four years of litigation, respondents achieved only a damages judgment

against the City and five of its police officers in the amount of \$33,350—the bulk of which (\$20,050) was awarded to redress their state common law claims, not their civil rights claims (\$13,300). Nothing in the opinions below indicates that respondents' victory constitutes anything more significant than it appears to be on the surface, *i.e.*, a monetary judgment against the City and five low-level officers for injuries sustained in a single incident. As Justice Rehnquist noted (No. A-122, slip op. 2), "no restraining orders or injunctions were ever issued against any of the defendants, and the City of Riverside was not compelled to, and did not, change any of its practices or policies as a result of the suit." Accordingly, in fixing a reasonable attorneys' fee in light of respondents' damages recovery, there is no reason not to apply the contingent fee rate in this case.

### CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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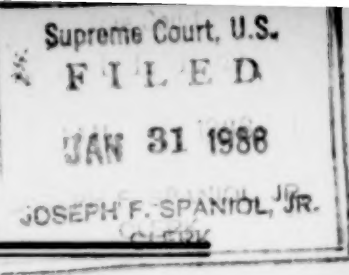
*Attorneys*

DECEMBER 1985





No. 85-224



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

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CITY OF RIVERSIDE, *et al.*,

*Petitioners,*

. v.

SANTOS RIVERA, *et al.*,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL  
DEFENSE AND EDUCATIONAL FUND, INC.  
IN SUPPORT OF RESPONDENTS**

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EDITOR'S NOTE

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## Question Presented

Whether attorneys' fees properly calculated on the basis of reasonable hours and rates should be reduced solely on the basis of the size of the monetary recovery?

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No. 85-224

IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1985

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CITY OF RIVERSIDE, et al,  
Petitioners,  
v.  
SANTOS RIVERA, et al.  
Respondents.

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On Writ of Certiorari to the United  
States Court of Appeals for the  
Ninth Circuit

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BRIEF AMICUS CURIAE OF THE NAACP LEGAL  
DEFENSE AND EDUCATIONAL FUND, INC.  
IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS<sup>1</sup>

The NAACP Legal Defense and Educational Fund, Inc. has been in the fore-

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<sup>1</sup> Letters consenting to the filing of this brief have been lodged with the Clerk of Court.

front of civil rights litigation for many years. As part of that effort we have had a long standing interest in the award of attorneys' fees adequate to ensure an appropriate level of private enforcement of the civil rights statutes. Thus, we have appeared as counsel or as amicus curiae in most of the leading civil rights attorneys' fees cases.<sup>2</sup>

In the present case, in addition to the interest of the Legal Defense Fund itself, we wish to present to the Court the interests and concerns of the private civil rights bar. The Legal Defense Fund, as are other organizations, is dependent on the continuing collaboration of private attorneys in bringing civil rights

<sup>2</sup>

E.g., Newman v. Piggie Pack Enterprise, Inc., 390 U.S. 400 (1968); Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974); Hutto v. Finney, 437 U.S. 678 (1978); Hensley v. Eckerhart, 461 U.S. 424 (1983); Johnson v. Georgia Highway Express Co., 488 F.2d 714 (5th Cir. 1974).

cases under 42 U.S.C. § 1983 and the various other civil rights statutes. Our nearly 200 cooperating attorneys are primarily single practitioners and attorneys in small firms. Unlike attorneys in large firms, they cannot depend on major commercial clients to support their pro bono activities. And, unlike lawyers who specialize in personal injury litigation, those who practice civil rights law cannot realistically depend upon a continuing flow of cases in which substantial fees may be taken from the recovery by the plaintiffs as an agreed upon percentage. To a very large degree, they depend upon the award of fees adequate to compensate them for the time actually expended on the cases they win.

It was precisely for these attorneys and their particular type of practice that Congress enacted the various fee statutes.

If the arguments of petitioners and their amici are accepted by this Court, these attorneys will, by and large, be driven out of the practice of civil rights law. The private enforcement of civil rights cases will be undermined and the enforcement of constitutional rights will be left almost exclusively to the pro bono efforts of a few large firms and to a few public interest organizations, which employ less<sup>3</sup> than 100 attorneys altogether.

We submit that such a result, however much desired by petitioners and their amici, would be totally contrary to the intent of Congress.

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<sup>3</sup> See "Counsel Fees In Public Interest Litigation," A Report by The Committee On Legal Assistance, 39 The Record of the Association of the Bar of the City of New York 300, 325 (1984).

SUMMARY OF ARGUMENT

I.

Civil rights cases, even those in which there is a monetary recovery, cannot simplistically be equated to contingent fee tort litigation or other types of commercial practice. Because of the large public issues and difficult legal questions involved, civil rights cases often require a substantial investment in time. Yet recoveries are typically small and uncertain; delays in payment are commonplace, in part because of litigation tactics of government and defense attorneys. The adoption of a proportionality rule would, therefore, have a devastating effect on the ability of plaintiffs to bring these cases.

II.

Congress clearly did not intend that fees be calculated as a percentage of a monetary recovery. Repeated attempts to have the fees acts amended to include such a provision have been rejected by Congress. Therefore, the Court should not adopt the rule urged by petitioners and their amici.

ARGUMENT

I.

CALCULATING FEES AS A PERCENTAGE OF A MONETARY RECOVERY IS IMPROPER IN A CIVIL RIGHTS CASE

1. In an amicus brief filed earlier this term, we have described the nature of civil rights practice and why it cannot simplistically be equated to ordinary commercial litigation. See Brief Amici Curiae of the NAACP Legal Defense and Educational Fund, Inc., et al., in Evans

v. Jeff D., No. 84-1288, at 9-14. We respectfully refer the Court to that discussion. Similarly, the parallel sought to be drawn here by petitioners and their amici between contingent fee tort litigation and civil rights litigation is totally inapposite.

If civil rights litigation were like tort litigation, no fee statute would have been necessary. Negligence cases can be extraordinarily lucrative. The risk of losing a certain percentage of cases is made up by large fee recoveries in others. Further, the litigation of such cases is handled in the same manner as is other ordinary commercial litigation. Thus, both parties are represented by an established bar that seeks reasonable compromise and the speedy disposition of cases.



The reality of civil rights litigation is far different. Defendants' attorneys, particularly when they represent governmental agencies, do not see civil rights litigation as ordinary cases that should be handled in an ordinary fashion. To the contrary, often they take umbrage over the very fact that a lawsuit is filed. A common litigation tactic of defendant's counsel is to fight a case to the bitter end.<sup>4</sup>

Moreover, as discussed fully in respondents' brief, Congress was fully aware both of the drawn out and protracted nature of civil rights litigation as well as the overwhelming inequality of resources between plaintiffs and defendants. City, county, and United States Attorneys, attorneys general, and agency counsel, as well as the investigative and support

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<sup>4</sup> See op cite supra n.3, at 322-23.

staff of governmental agencies, are pitted against one or a handful of, at best, middle income plaintiffs and the few attorneys willing to take on such odds. The fact of the matter is that local and state governments are well equipped to protect their rights.

2. To the extent that public funds are unduly expended on fee awards, it has been our own experience that this is more often caused by the litigation tactics of government defense attorneys than by the actions of the plaintiffs. The present case provides a vivid example. It should have been settled early with a full apology to plaintiffs and a reasonable monetary settlement. Instead it was fought with public funds in an unsuccessful attempt to defend indefensible actions of police officers. As the Court of Appeals for the District of Columbia noted

in Copeland v. Marshall, 641 F.2d 880, 904 (D.C. Cir. 1980) (en banc), it is a government's right to defend a case in any way it chooses, but once it has decided to defend a case to the death, it may not then be heard to complain when it is faced with a reasonable attorney's fee caused by its own litigation tactics.

Even in cases where the defense has been reasonable, the nature of civil rights claims often results in extended litigation. Facts are often difficult to gather; for example, even the identity of the appropriate defendants may be unknown or difficult to ascertain, see, e.g., Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied sub nom. Employee-Officer John, No. 1765 Badge Number, 414 U.S. 1033 (1973), a matter rarely in dispute in ordinary tort litigation. Often, access both to the

vital information underlying the suit and to the plaintiffs themselves is controlled by the defendants. See, e.g., Ruiz v. Estelle, 550 F.2d 238, 239 (5th Cir. 1977) ("The record discloses that in response to their participation in this litigation, these inmates have been subjected . . . to threats, intimidation, coercion, punishment, and discrimination, all in the face of protective orders. . . ."). Moreover, uncertainties in the law, particularly regarding the liability of government agencies<sup>5</sup> and personnel acting in their official capacities,<sup>6</sup> may lead to multiple

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<sup>5</sup> See Monell v. Dept. of Social Services, 436 U.S. 658 (1978); Brandon v. Holt, \_\_\_\_ U.S. \_\_\_\_, 83 L.Ed.2d 878 (1985).

<sup>6</sup> See, e.g., Pulliam v. Allen, \_\_\_\_ U.S. \_\_\_\_, 80 L.Ed.2d 565 (1984); Butz v. Economou, 438 U.S. 478 (1978); Pierson v. Ray, 386 U.S. 547 (1967).

<sup>7</sup>  
appeals. Under petitioner's rule all such work -- no matter how reasonable or necessary -- would, in effect, go uncompensated.

3. The inappropriateness of a proportionality rule also follows from the fact that, for a variety of reasons, the availability of monetary and even injunctive relief is limited in many civil rights cases. As long ago as Hague v. CIO, 307 U.S. 496 (1939), this Court recognized that tortious invasions of constitutional rights were, by their nature, difficult to measure in monetary terms. Under Carey v. Piphus, 435 U.S. 247 (1978), a plaintiff may only be able to obtain minimal or only nominal damages. At the same time, a plaintiff who has suffered a past injury may not have

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<sup>7</sup> For example, there were two appeals in Tennessee v. Garner, 471 U.S. \_\_\_, 85 L.Ed.2d 1 (1985), before the case reached this Court, and further proceedings will be required before judgment is entered.

standing to obtain injunctive relief if, as in this case, a repetition of the unconstitutional conduct is purely speculative. Los Angeles v. Lyons, 461 U.S. 95 (1983).

Congress was aware of these doctrines and their effect on the economic viability of civil rights litigation. Accordingly, it observed that

While damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., at 9 (Sept. 15, 1976) (citing Wood v. Strickland, 420 U.S. 308 (1975);



Scheuer v. Rhodes, 416 U.S. 232 (1974);  
and Pierson v. Ray, 386 U.S. 547 (1967))  
8  
(footnote omitted; emphasis added).

But consider the result of a decision ignoring the implications of this legislative history and imposing a rule making fees proportional to the amount in damages. Inevitably, civil actions to redress certain types of constitutional violations will not be brought solely because they are unlikely to generate damage awards large enough in support a proportional fee award "adequate to attract competent counsel." S. Rep. No. 94-1011, 94th Cong., 2d Sess., at 8 (June 26, 1976); H.R. Rep. No. 94-1558 at 9. Not only will Congress's clearly expressed purpose be subverted, but also the

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8 The report goes on to state that in a third class of cases, those in which "only injunctive relief is sought . . . prevailing plaintiffs should ordinarily recover their counsel fees." Id.



hope that damage suits can be a viable means to deter fourth amendment violations, see Bivens v. Six Unknown Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting), will be frustrated; the only persons with a meaningful remedy will be criminal defendants.

The reality is plain. The Bill of Rights is not self-executing; without plaintiffs there will be no enforcement; without attorneys financially able to bring cases there will be no plaintiffs. The government's assertion that there are many attorneys who would take on these difficult and time-consuming cases in the expectation of a one-third fee from a \$33,000 judgment is not only belied by the facts of this case -- there were no local attorneys willing to take it -- but can only be described as a fantasy. It certainly has no relation to the real

world of civil rights practice as the Legal Defense Fund and its cooperating attorneys experience it every day,<sup>9</sup> or as Congress viewed it when it considered and passed what is now § 1988.

4. The arguments of the petitioner and its amici, particularly those of the United States, are totally contrary to congressional intent and the decision of this Court in Hensley v. Eckerhart, 461 U.S. 424 (1983). The government advances a number of arguments that it now states would limit the proportionality rule to those cases where the only relief sought

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<sup>9</sup> The Equal Employment Opportunity Commission has an entirely different view than that of the Solicitor General concerning the impact of a proportionality rule on the private bar and the enforcement of the civil rights acts. Indeed, it urged that the United States support the position of respondents in this case. Its memorandum to the Solicitor General was printed in full in the Daily Labor Report of January 9, 1986 (BNA), at pp. E-1 to E-5. For the convenience of the Court, we have reproduced the memorandum on the appendix to this Brief.

or recovered is money damages in the nature of a tort recovery. But it is hard to see how or why the rule they seek can be so limited in the face of similarly worded and intentioned statutes. See New York Gaslight Club v. Carey, 447 U.S. 54, 70-71 n. 9 (1980). Thus, in individual Title VII actions, defendants will soon assert that fees should be limited to a proportion of the backpay recovery. Such a rule would, of course, be devastating to Title VII. Even for a case involving an upper level job, a recovery of backpay for a person denied a promotion is unlikely to exceed \$20,000. Particularly when the defendant is a government employer (and we speak from 14 years of experience in litigating Title VII cases against the federal government), the achievement of that result may take hundreds, if not thousands, of attorney hours.

We, therefore, are able to state without qualification that a rule of proportionality would have the immediate and wholly predictable effect of driving from practice those attorneys who are responsible for providing representation to civil rights plaintiffs in the vast majority of civil rights and Title VII litigation --single practitioners and attorneys from small firms.<sup>10</sup>

## II.

### A PROPORTIONALITY RULE IS CONTRARY TO CLEAR CONGRESSIONAL INTENT

The respondents' brief sets out fully and interprets correctly the legislative history of the 1976 Fees Act. In addition, we wish to bring to the Court's

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<sup>10</sup> See Chambers and Goldstein, "Title VII at Twenty: The Continuing Challenge," 1 The Labor Lawyer 235, 255-58 (1985).

attention the fact that the federal government and state and local governments are now attempting to obtain from the Court through a restrictive interpretation of § 1988 what they have so far tried but failed to achieve in Congress. Indeed, so far they have been unable even to get a bill out of subcommittee despite five years of effort.

At least as far back as 1981, an effort was begun to convince Congress to amend drastically § 1988 and other fee acts as they affect government defendants. Many of the arguments made here -- the alleged burdens on the courts and on local governments, the purported multiplicity of frivolous law suits, the unidentified attorneys getting rich by "windfalls" -- were made to Congress. See Municipal Liability Under 42 U.S.C. § 1983: Hearings Before the Subcommittee on the Constitu-

tion of the Senate Judiciary Committee,  
97th Cong., 1st Sess. (1981), pp. 147-52  
and 288-91 (Statement of National Insti-  
tute of Municipal Law Officers); 524-558  
(Statement of National Association of  
Attorneys General). Indeed, it was  
specifically recommended that the amount  
of fees be "incorporat[ed] ... into the  
amount being sought in damages." And  
that:

If the case carves out a new  
area of civil rights law, or if  
the case will have a widespread  
impact, the prevailing party's  
attorney would be entitled to a  
larger fee than would be  
appropriate where the nature of  
the case is similar to a  
personal injury case, such as  
an injury suffered at the hands  
of a police officer. In the  
latter instance the judgment  
will be of little impact or  
interest beyond the parties  
directly involved and the fees  
awarded should be so limited.



Id. at 291. However, the proposed fee statute failed to be reported out of committee.

Efforts to have § 1988 amended escalated with the issuance of "Civil Rights Attorney's Fees Awards Act of 1976: A Report to Congress," by the National Association of Attorneys General. See The Legal Fee Equity Act; Hearing Before the Subcommittee on the Constitution of the Senate Judiciary Committee (98th Cong., 2d Sess, 1984), pp. 237-305. The Report urged that the Fees Act be amended specifically to prevent fees that were allegedly disproportionate to monetary awards. Given as an example of a case in which "the amount of fees awarded was grossly disproportionate to the degree of success on the merits" was this very case, Rivera v. City of Riverside, 679 F.2d 795 (9th Cir. 1982). Id. at 272-74.



This recommendation was incorporated into The Legal Fee Equity Act (S.2802, 98th Cong., 2d Sess. (1984)), which was drafted by the United States Department of Justice. Id. at 3. Section 6(b)(5) of the Act, which would have amended not only § 1988 but every other federal fees statute as it applies to federal, state and local governments, provided that fees will be reduced when:

[T]he amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the monetary result or injunctive relief achieved in the proceeding.

Id. at 24-25. The section-by-section analysis states that the section is intended to deal with, for example, "cases where \$100,000 is awarded in attorneys' fees for a \$30,000 judgment." Id. at 124-125.

Again, the effort to amend the fees acts got nowhere and the bill died in subcommittee. The Legal Fee Equity Act was again introduced in the last session of Congress (S.1580, 99th Cong., 1st Sess. (1985)); see 131 Cong. Rec. S.10876 (daily ed. Aug. 1, 1985). To date, it has gone nowhere in either house.

Thus, Congress has refused, despite persistent attempts by a consortium representing all levels of government in this country, to amend § 1988 to incorporate the very rule urged by petitioners and their amici. As recently noted in Vasquez v. Hillery, \_\_\_\_ U.S. \_\_\_\_, 54 U.S.L.W. 4068, 4071-72 (January 14, 1986), the Court is properly loath to interpret a statute to accomplish what petitioners have repeatedly sought but failed to obtain in Congress. Accord Patsy v. Florida Bd. of Regents, 457 U.S. 496

(1982); see also Bob Jones University v. United States, 461 U.S. 574, 599-602 (1983). In light of the totality of its legislative history, the Fees Act cannot reasonably be read to mean that fees are to be limited to a percentage of a monetary award in civil rights cases.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

Memorandum of the  
EEOC to the Solicitor  
General, Nov. 18, 1985.



EEOC Memorandum to Solicitor General  
Charles Fried

Nov. 18, 1985

MEMORANDUM

TO: CHARLES FRIED  
Solicitor General  
Department of Justice

FROM: JOHNNY J. BUTLER  
General Counsel (Acting)  
Equal Employment Opportunity  
Commission

SUBJECT: Recommendation for participation  
as amicus curiae in City of  
Riverside v. Rivera, cert.  
granted, 54 U.S.L.W. 3270 (Oct.  
22, 1985) (No. 85-224).

The Equal Employment Opportunity Commission recommends participation in the above case as amicus curiae in support of respondents Rivera et al. (plaintiffs below). The brief for petitioner is due on December 5, 1985, and the brief for respondent is due on January 4, 1986.

Interest Of The Equal Employment Opportun-

ity Commission

This case presents the question of what are the appropriate standards governing an award of attorney's fees under 42 U.S.C. 1988 when the monetary amount recovered in damages for violations of constitutional and civil rights is less than the fees requested.<sup>1</sup> Resolution of this issue will affect substantially attorney's fee awards under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. Section 1988 was expressly modeled on Title VII's fee provision, 42

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<sup>1</sup> As discussed infra, this issue was not expressly raised in the petition for certiorari. However, subsequent to the petition, Justice Rehnquist issued an opinion explaining his grant of a stay and indicating that the propriety of a fee award which is disproportionate to the amount of monetary relief is the central issue in the case. City of Riverside v. Rivera, 54 U.S.L.W. 3143 (Rehnquist, Circuit Justice) (on application for stay) (Sept. 10, 1985).



U.S.C. 2000e-5(k), and standards developed in §1988 cases are applied to Title VII. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 433 n. 7 (1983); S. Rep. No. 94-1011 (1976) at 4-6.

Because Title VII provides solely for equitable relief, monetary recovery is limited to amounts owed for back pay. Section 706(g), 42 U.S.C. 2000e-5(g).<sup>2</sup> Accordingly, the monetary recovery in an individual Title VII case may be relatively meager. Petitioners contend, and Justice Rehnquist's opinion on the stay application suggests he may agree, that an award of fees significantly larger than

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<sup>2</sup> The courts have held that compensatory and punitive damages are not available under Title VII. See Patzer v. Bd. of Regents of Univ. of Wisc., 763 F.2d 851, 854 n. 2 (7th Cir. 1985); Irby v. Sullivan, 737 F.2d 1419, 1423 (5th Cir. 1984); Walker v. Ford Motor Co., 684 F.2d 1355, 1363-64 (11th Cir. 1982), and cases cited therein.

the amount of damages awarded is per se unreasonable. (Reply br. at 2, 5; 54 U.S.L.W. 3143-44). However, in a Title VII case a rule restricting the award of attorney's fees solely because the dollar amount of damages is low could result in less than full relief for identified individual victims of discrimination who successfully bring suit. It would also discourage private attorneys from taking Title VII cases which involve only individual claims. These results are contrary to Congress's intent that aggrieved individuals, serving as "private attorney[s] general," complement the Commission's enforcement efforts. See Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 416-17 (1978), quoting, Newman v. Piggie Park Enterprises, 390 U.S. 400,

402 (1968). They are also inconsistent with the Equal Employment Opportunity Commission's recently stated policy that nothing less than "prompt, comprehensive and complete relief for all individuals directly affected by [employment discrimination]" is satisfactory. (See EEOC Statement on Remedies and Relief For Individual Cases of Unlawful Discrimination, Feb. 5, 1985, copy attached). Accordingly, we believe that it is important that our views be presented to the Court.

### Background<sup>3</sup>

This suit arose from the violent breakup of a party at the home of Santos and Jennie Rivera by members of the police force of Riverside, California.<sup>4</sup> The Riveras and their guests, who were all of Mexican descent, claimed that the warrantless break-in of their house, accompanied by massive amounts of tear gas, verbal abuse and, in some instances, severe physical abuse, violated their First, Fourth, Fifth and Fourteenth Amendment

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<sup>3</sup> We base our statement on the opinions attached to the petition for certiorari, the complaint, and the pretrial order filed in district court. We have not reviewed the rest of the record in this case.

<sup>4</sup> Five persons, all plaintiffs herein, were arrested. Charges against one, Santos Rivera, were dropped by the police department prior to the filing of a complaint. Charges against the other four were dismissed by the municipal court upon an explicit finding of no probable cause.

rights, as well as their rights under the Civil Rights Act of 1870, 42 U.S.C. 1981, 1983, 1986.

Plaintiffs initially named thirty members of the Riverside police department as defendants, as well as the chief of police and the city itself. At an early stage of the proceedings, summary judgment as to seventeen of the police officers was granted on the ground that they merely had been present at the arrest scene and were not personally responsible for the constitutional and other deprivations. (Pet. App. 8-1).

The litigation continued for a period of five years, culminating in a favorable jury award for all eight plaintiffs against six of the individually named remaining defendants and the City of Riverside. Total monetary damages awarded

equalled \$33,350.<sup>5</sup> (Pet. App. 6-1). The liability determinations have never been contested by the city or any other defendant.

The district court entered an award of \$245,456.25 as attorney's fees and costs for the preceding five years of litigation. (Pet. App. 6-1). The court awarded plaintiffs' attorneys essentially all the hours requested, disallowing certain costs as impermissible under §1988. The court based its decision on

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<sup>5</sup> Although plaintiffs initially requested injunctive and declaratory relief, those requests were not pursued at trial. As explained by respondents Rivera et al. in their opposition to the petition for certiorari, injunctive relief was not requested as an injunction ordering the police to obey the law was superfluous. (Resp. Opp. at 3 n. 3). The district court, however, indicated that had such an "obey the law" injunction been sought, it would have been granted based on the severity of the constitutional violations by some of the officers. (See Opp. Cert. App. A-1 - A-2).

findings that, inter alia, the "action presented complex issues of law in a case involving eight individual plaintiffs, eleven individual defendants and a municipal defendant" (Pet. App. 6-2); "[g]iven the nature of this lawsuit, many attorneys . . . would have been reluctant to institute this action" (Ibid.); and "[p]laintiffs maintained this civil action in order to secure the vindication of important constitutional rights." (Id. at 6-5).

The court of appeals upheld the award. (Pet. App. 5-1). It refused to reduce the award because of the unnecessary[sic] claims, concluding that they were related to the successful claims. (Id. at 5-9). The court also rejected defendants'



contention that the amount of attorney's fees award must be proportionate to the jury verdict. (Id. at 5-11 - 5-13).

Thereafter, a petition for writ of certiorari was granted, and the fees judgment was vacated and remanded for further proceedings in light of Hensley v. Eckerhart, 461 U.S. 424 (1983). (Pet. App. 4-1).

After a subsequent hearing and briefing, and after reconsidering the record, the district court affirmed the original fee award. (Pet. App. 2-1). The court found that the relatively small size of the damage award resulted from "(a) the general reluctance of jurors to make large awards against police officers, and (b)

the dignified restraint which the plaintiffs exercised in describing their injuries to the jury." (Id. at 2-5).<sup>6</sup>

The court refused to reduce the award because of the unsuccessful claims, finding that plaintiffs were successful on the "central and most important issue . . . [of] whether there was police misconduct;" "all claims . . . were based on a common core of facts;" and "[t]he

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<sup>6</sup> At the hearing, the district court elaborated on this point, stating:

I have tried several civil rights violation cases in which police officers have figured and in the main they prevailed because juries do not bring in verdicts against police officers very readily nor against cities. The size of the verdicts against the individuals is not at all surprising because juries are very reluctant to bring in large verdicts against police officers who don't have the resources to answer those verdicts. The relief here I think was absolutely complete. (Resp. App. B-5).

claims on which plaintiffs did not prevail were closely related to the claims on which they did prevail" and "cannot reasonably be separated. . . ." (Id. at 2-6).<sup>7</sup> The court found that the amount of time expended by counsel "reflected sound legal judgment" and was reasonable because "[c]ounsel for plaintiffs achieved excellent results . . . ." (Id. at 2-7 -2-8). The district court stated that it was

shocked at some of the acts of the police officers in this case and was convinced from the testimony that these acts were motivated by a general hostility to the Chicanos community in the area where the incident occurred. The amount of time expended by plaintiffs' counsel in conducting this litigation was clearly reasonable and necessary to

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<sup>7</sup> The court noted that given the conflicting testimony about the roles of individual police officers, "[u]nder the circumstances of this case, it was reasonable for plaintiffs initially to name thirty-one individual defendants." (Pet. App. 2-4).

serve the public interest as well as the interests of plaintiffs in the vindication of their constitutional rights.

(Id. at 2-8 - 2-9).

The court of appeals affirmed, finding that the district court had correctly reconsidered the case in light of Hensley and that the fee award was within the district court's discretion. (Pet. App. 1-4). The court held that the record supports the district court's findings that all the claims involved common facts and related legal theories. (Id. at 1-6). According to the court of appeals, the district court followed Hensley's precepts by focusing on "the degree of success in relation to the ultimate award of fees and [finding] a reasonable relationship between the extent

of that success and the amount of the award." (Id. at 1-7). The court of appeals again rejected "the proposition that there need be a relationship between the amount of damages . . . and the amount of attorney's fees . . . ." (Id. at 1-8 -1-9).

On August 9, 1985, defendants filed a petition for a writ of certiorari, presenting the question "[w]hat are the proper standards within which a district court may exercise its discretion in awarding attorney's fees to prevailing parties under Section 1988 . . . ." Petitioners contended generally that the district court abused its discretion and disregarded Hensley by failing to reduce the fee award. (Pet. 29-37). Petitioners challenged a number of specific aspects of the fee award, primarily the court's

failure to reduce the hours allotted for seven items. (Pet. 40-46). Petitioners also argued that counsel for plaintiffs' time records were inadequate. (Pet. 49-58).<sup>8</sup>

On August 28, 1985, Justice Rehnquist issued his opinion on the stay application, discussing solely the "significant question [presented in this case] involving the construction of §1988: should a court, in determining the amount of 'reasonable attorney's fee' under the statute, consider the amount of monetary damages. . . ." 54 U.S.L.W. at 3143.<sup>9</sup> In

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<sup>8</sup> The petition only obliquely refers to the district court's decision not to reduce the fees to account for unsuccessful claims. See, e.g., Pet. at 35, 54.

<sup>9</sup> Justice Rehnquist noted that the issue framed by petitioners "is not a model of specificity, [but] it does 'fairly subsume,' *inter alia*, the disproportionality issue." 54 U.S.L.W. at 3143.



his view, "the award of attorney's fees in this case, representing more than seven times the amount of the monetary judgment obtained, is so disproportionately large that it could hardly be described as 'reasonable.' "Id. at 3144. After noting a split in the circuits on the issue,<sup>10</sup> Justice Rehnquist found that "[n]either Hensley nor Blum . . . addressed whether disproportionately between the amount of the monetary judgment obtained and the

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<sup>10</sup> Justice Rehnquist contrasted DiFilippo v. Morizio, 759 F.2d 231 (2d Cir. 1985), and Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983), which held that the size of the award alone does not warrant reduction of a fee, with Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981), which held that the amount of the recovery may indicate the reasonableness of the time spent. 54 U.S.L.W. 3144. He failed to cite a later Seventh Circuit decision, Lynch v. City of Milwaukee, 747 F.2d 423 (7th Cir. 1984), which held that an award of nominal damages does not warrant reduction of the fee award where the plaintiff primarily sought nonmonetary relief.



amount of the attorney's fee, standing alone, is a consideration that might properly lead a court to reduce the fee." Ibid. (emphasis added). He concluded that, except in cases involving primarily injunctive relief or defendants' bad faith conduct, "the time billed for a lawsuit must bear a reasonable relationship not only to the difficulty of the issues involved but to the amount to be gained or lost by the client in the event of success or failure." Ibid. Justice Rehnquist held that the probability of petitioners' success on this issue was sufficiently great to warrant a stay.

After the issuance of Justice Rehnquist's opinion, the disproportionality issue was briefed by respondents in their opposition to the petition and was the focus of petitioners' reply brief.

## Discussion<sup>11</sup>

It is our position that the size of the damage award, standing alone, does not justify reduction of the attorney's fees award for counsel time otherwise reasonably expended on successful claims. This is not to say, however, that the amount of monetary relief is irrelevant. The Supreme Court held in Hensley v. Eckerhart, 461 U.S. 424, 436 (1983), that "the most critical factor [in setting a fee award] is the degree of success

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<sup>11</sup> We will discuss the legal issue of whether an award of attorney's fees must be in proportion to the monetary relief awarded. The petition also raises numerous factual issues regarding the reasonableness of the hours expended by plaintiffs' counsel. We take no position on these issues, the resolution of which depends on a review of the full record. However, in our view, the factual issues articulated by petitioners are not sufficiently significant to warrant briefing by the government, particularly inasmuch as the standard of review is abuse of discretion.

obtained." The amount of relief awarded is one consideration in determining plaintiff's level of success. However, the damage award can not be viewed in a vacuum or in absolute terms, as petitioners contend. See reply br. at 5. Rather, to measure success the amount of monetary relief awarded should be compared to the relief which is sought or could be reasonably expected if plaintiff were fully successful. This approach is consistent with the intent and purpose of the fee-shifting statute, the standards adopted in Hensley, and the near uniform view of the courts of appeals. Because the district court basically followed this approach, we recommend supporting respondents on this legal issue.

1. In the context of Title VII, the Supreme Court recognized in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978), that individual plaintiffs are the "chosen instrument[s] of Congress to vindicate 'a policy that Congress considered of the highest priority.'" Quoting, Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968). There are "strong equitable considerations" for granting plaintiffs fees, particularly because they are being "award[ed]. . . against a violator of federal law." 434 U.S. at 418. Thus, the legislative history of Title VII demonstrates that "one of Congress's primary purposes in enacting the section [providing attorney's fees to a prevailing party] was to 'make it easier for a plaintiff of limited means to bring a meritorious suit.'" 434 U.S.

at 420, quoting, 110 Cong. Rec. 12724 (1964) (remarks of Sen. Humphrey). Accord, New York Gaslight Club v. Carey, 447 U.S. 54, 63 (1980). The same policies underlie the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. The Senate report found that "fees are an integral part of the remedy necessary to achieve compliance with our statutory policies." S. Rep. No. 94-1011 (1976) ("Senate Report") at 3. See also, e.g., Senate Report at 2 (enforcement of civil rights laws "depend[s] heavily upon private enforcement and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate . . . important Congressional policies"); H.R. Rep. No. 94-1558 (1976) at 1 ("House Report") ("effective enforce-

ment of Federal civil rights depends largely on the efforts of private citizens").

The standard suggested by Justice Rehnquist -- that attorney's hours otherwise reasonable and necessary to the litigation should not be fully compensated if their value exceeds the amount of damages recovered -- will necessarily cause attorneys to pursue less vigorously claims of low monetary value, such as those involving single individuals. This would defeat the purpose of the fee-shifting statutes to encourage full enforcement of civil rights laws. It would also frustrate Congress's intent to award fees "adequate to attract competent counsel, but which do not produce windfalls" (Senate Report at 6), inasmuch as compe-

tent attorneys will have less incentive to represent individual claimants who cannot finance their own litigation.

The legislative history of §1988 and other fee provisions demonstrate that the level of monetary recovery should not, of itself, dictate the amount of attorney's fees. For example, the Senate Report states: "It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation . . . and not be reduced because the rights involved may be nonpecuniary in nature." Senate Report at 6 (emphasis added). See also 122 Cong. Rec. 31832 (September 22, 1976) (Remarks of Sen. Hathaway in support of bill which became §1988)("In the typical case . . . the citizen who must enforce the [civil



rights] provisions through the courts has little or no money with which to hire a lawyer, and there is often no damage claim from which an attorney could draw his fee.") Similarly, the House Report recognized that not all civil rights litigation results in large damage awards, and that "in some cases immunity doctrines and special defenses . . . preclude or severely limit the damage remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected." House Report at 9.<sup>12</sup>

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<sup>12</sup> The legislative history's citation to three early attorney's fees cases is significant. In the Senate Report (at 6), Congress cited approvingly use of the Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), factors and gave as examples of their correct application three cases: Stanford Daily v. Zurcher,

2. Reduction of a fee award based solely on the amount of damages recovered is also inconsistent with the standards for assessing fees previously established by the Supreme Court. In Hensley v. Eckerhart, the Court clarified the means by which "adequate" fees are to be determined: initially, the "number of hours reasonably expended on the litigation [is] multiplied by a reasonable hourly rate." 461 U.S. at 433. This figure, sometimes called the "lodestar" (e.g. Copeland v. Marshall, 641 F.2d 880, 890-91 (D.C. cir. 1980) (en banc)), is then subject to further adjustment based,

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64 F.R.D. 680 (N.D. Ca. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Ca. 1974); and Swann v. Charlotte-Mecklenburg Bd. of Ed., 66 F.R.D. 683 (W.D.N.C. 1975). In none of those cases were large amounts of monetary damages awarded, if any, and, in the Stanford Daily case, no injunctive relief was ordered either.

among other things, on the "'results obtained.'" 461 U.S. at 434, quoting, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). However, the Court made it clear that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation . . ." 461 U.S. at 435. This holding forecloses any argument that a fully successful plaintiff should be awarded less than a fully compensatory fee solely because the amount of damages at issue was low.

Furthermore, as noted above, the Court directed that in setting fees the primary consideration should be on whether the "degree of success" justified the hours expended on the litigation. There

can be no question that where a significant aspect of the relief sought is monetary, the amount of the damages is relevant in measuring the degree of success. However, the Court's repeated use of terms such as "degree of success" (461 U.S. at 436 ), "extent of success" (id. at 438, 439 n. 14), and "level of success" (id. at 434, 439), indicate that the important comparison is between the relief sought and the relief obtained.

The Court in Hensley specifically rejected a "precise rule or formula" or a "mathematical approach" to determine attorneys' fees by comparing the number of successful claims to the total number of claims asserted. 461 U.S. at 436, 435 n. 11. As the Court remarked: "Such a ratio provides little aid in determining what is a reasonable fee in light of all relevant

factors." 461 U.S. at 435-36 n. 11. The Court also rejected a strict mathematical approach in Blum v. Stenson, \_\_\_\_ U.S. \_\_\_\_, 104 S.Ct. 1541, 1549-50 n. 16 (1984), holding that the numbers of persons benefitted is not a valid consideration in setting fees. The Court commented, "presumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or indeed, in protecting the civil rights of a single individual." Ibid. For the same reason -- that counsel's diligence will not vary according to the amount involved -- a mathematical formula requiring that the fee award be in proportion to the damages is improper.

Justice Rehnquist suggests that any attorney using "billing judgment" would not bill more than the amount recovered.

54 U.S.L.W. at 3144. However, as the above cited legislative history reflects, the purpose of the civil rights fee-shifting provisions is to allow individuals to obtain redress for infringement of rights which cannot be valued in strict monetary terms.<sup>13</sup> See Jaquette v. Black Hawk County, Iowa, 710 F.2d 455, 460 (8th Cir.

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<sup>13</sup> Justice Rehnquist would not apply a mathematical formula to cases involving primarily injunctive or other nonpecuniary relief. 54 U.S.L.W. at 3144. However, the same rights are involved, and in some Title VII cases this distinction makes little sense. For example, two individuals may have identical discrimination in their to promote them to per year. and

1983) ("marketplace factors are often absent from civil rights litigation," because "it is difficult to place a pecuniary value on relief sought when the injury involves the infringement of the civil or constitutional rights of a plaintiff"). Furthermore, the "billing judgment" required of counsel is to "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary . . . ." Hensley, 461 U.S. at 434. We find no support in Hensley or any other authority for excluding under the rubric of "billing judgment" compensation for necessary hours expended on a successful civil rights claim.<sup>14</sup>

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<sup>14</sup> The determination that the number of hours is "reasonable" necessarily includes a finding that there was a valid reason for the hours expended. For example, in an individual Title VII case, substantial attorney time may be required because of the complexity of the legal issues or because of defendant's tactics. If there



3. A look at the pertinent recent court of appeals' decisions reveal near uniform agreement that the size of the damage award is one relevant factor in assessing the amount of fees, but that there is no necessary proportional relationship between the amount of damages the amount of fees awarded. See Nephew v. City of Aurora, 766 F.2d 1464, 1467 (10th Cir. 1985); DiFilippo v. Morizio, 759 F.2d 231, 235-36 (2d Cir. 1985); Lynch v. City of Milwaukee, 747 F.2d 423, 428-29 & n. 5 (7th Cir. 1984); Wojtkowski v. Cade, 725 F.2d 127, 131 (1st Cir. 1984); Jaquette v. Black Hawk County, Iowa, 710 F.2d 455, 458, 461 (8th Cir. 1983); Perez v.

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is no valid explanation for the amount of work, it is not reasonable. In this case, the district court found that the hours were reasonably expended in view of the complexity of the case. (Pet. App. 2-2). Petitioner's real quarrel is with this determination, as their petition reflects.

University of Puerto Rico, 600 F.2d 1, 2 (1st Cir. 1979); Burt v. Abel, 585 F.2d 613, 618 (4th Cir. 1978); See also Bonner v. Coughlin, 657 F.2d 931, 934 (7th Cir. 1981).<sup>15</sup>

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<sup>15</sup> Justice Rehnquist cites two cases --DiFilippo v. Morizio and Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983) --for the proposition that courts of appeals have held that the amount of damages received is not a permissible factor in awarding attorney's fees. DiFilippo, however, holds that comparison of damages to "typical . . . awards in the same type of case" is relevant. 759 F.2d at 236. While Ramos does state that fees should not be reduced because the recovery is small, the Tenth Circuit subsequently distinguished Ramos on the ground that only declaratory and injunctive relief had been requested. Nephew v. City of Aurora, 766 F.2d at 1465-66.

In Cunningham v. City of McKeesport, 753 F.2d 262, 268-69 (3rd Cir. 1985), pet. for cert. filed, 53 U.S.L.W. 3839 (May 14, 1985), also cited by Justice Rehnquist, the court of appeals held that it was incorrect for the district court to reduce the attorney's fee award by 50% on grounds not raised by defendants. The issue regarding the proportion of fees sought (\$35,000) to damages awarded (\$17,000) was discussed chiefly in a statement by Judge Adams dissenting from the denial of

Courts which have analyzed the issue in detail after Hensley have recognized that the amount of damages is appropriately considered as one measure of the level of success. See Nephew v. City of Aurora, 766 F.2d at 1466-67; DiFilippo v. Morizio, 759 F.2d at 231; Jaquette v. Black Hawk County, Iowa, 710 F.2d at 461. The relevant comparison is "whether the size of the award is commensurate with awards in [similar] cases generally, rather than whether the award viewed in some absolute terms is high or low." DiFilippo, 759 F.2d at 235. Another possible comparison is between the "remedy sought . . . and remedy obtained . . . ." Jaquette, 710 F.2d at 461. Where the comparison reveals that "plaintiffs won an unambiguous

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rehearing en banc.

victory . . . their attorneys should recover a fully compensatory fee."

DiFilippo, 759 F.2d at 235.

4. The district court in this case correctly considered the size of the damage award in relation to the relief reasonably to be expected in this kind of case. The court found that the size of the award did not reflect limited success, but rather it resulted from a jury's general reluctance to make large awards against police officers and respondents' refusal to "play up" their "insulting and humiliating" injuries. (Pet. App. 2-5 -2-6). The court pointed out at the hearing that respondents were much more successful than the plaintiffs in several other civil rights cases, with which the court was familiar, involving police officers and cities. (Resp. App. B-5).

Accordingly, the court found that respondents had achieved "excellent results." (Pet. 2-7).

The district court can be criticized for not making more detailed findings and for relying solely on its own experience in determining that the results were better than those generally obtained in the same kind of case. Nevertheless, the court appropriately considered the size of the damage award as one relevant factor in determining the extent of success, and petitioners have pointed to nothing which indicates that the court's findings regarding the damage award were erroneous.

Accordingly, we recommend that a brief be filed in favor of respondents discussing the legal standards to be

applied to requests for attorney's fees greater than the amount of the monetary judgment.







No. 85-224

Supreme Court, U.S.

FILED

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

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CITY OF RIVERSIDE, *et al.*,  
v. *Petitioners*,  
SANTOS RIVERA, *et al.*,  
*Respondents*.

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On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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**BRIEF FOR THE WASHINGTON COUNCIL OF  
LAWYERS, THE CHICAGO COUNCIL OF LAWYERS,  
THE STATE BAR OF MICHIGAN, THE ANTITRUST,  
TRADE REGULATION AND CONSUMER AFFAIRS  
DIVISION OF THE DISTRICT OF COLUMBIA BAR, THE  
LOS ANGELES COUNTY BAR ASSOCIATION, THE  
MILWAUKEE BAR ASSOCIATION, THE COMMITTEE  
ON LEGAL ASSISTANCE OF THE ASSOCIATION OF  
THE BAR OF THE CITY OF NEW YORK, THE BAR  
ASSOCIATION OF SAN FRANCISCO, AND THE  
PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION  
AS AMICI CURIAE SUPPORTING RESPONDENTS**

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## QUESTION PRESENTED

*Amici* will address the following question:

Whether, in a damages case brought under the federal civil rights laws, a prevailing plaintiff's award of attorneys' fees under 42 U.S.C. § 1988 is limited to some fixed proportion of the damages received.



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| 122 Cong. Rec. 31832 (1976) .....                                                                                                                                               | 9                       |
| <br><i>Other Materials</i>                                                                                                                                                      |                         |
| Newman <i>Suing the Lawbreakers: Proposals to<br/>Strengthen the § 1983 Damage Remedy for Law<br/>Enforcers' Misconduct</i> , 87 Yale L.J. 447<br>(1978) .....                  | 10, 19                  |
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| Roehl, "Modern Billing Techniques—1968 Sur-<br>vey," <i>Proceedings of the Third National Con-<br/>ference on Law Office Economics and Manage-<br/>ment</i> 171 (ABA 1969)..... | 17                      |
| Schwemm, <i>Compensatory Damages in Federal<br/>Fair Housing Cases</i> , 16 Harv. C.R.-C.L. L. Rev.<br>83 (1981) .....                                                          | 19                      |



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

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No. 85-224

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CITY OF RIVERSIDE, *et al.*,  
*Petitioners,*

v.

SANTOS RIVERA, *et al.*,  
*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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**BRIEF FOR THE WASHINGTON COUNCIL OF  
LAWYERS, THE CHICAGO COUNCIL OF LAWYERS,  
THE STATE BAR OF MICHIGAN, THE ANTITRUST,  
TRADE REGULATION AND CONSUMER AFFAIRS  
DIVISION OF THE DISTRICT OF COLUMBIA BAR, THE  
LOS ANGELES COUNTY BAR ASSOCIATION, THE  
MILWAUKEE BAR ASSOCIATION, THE COMMITTEE  
ON LEGAL ASSISTANCE OF THE ASSOCIATION OF  
THE BAR OF THE CITY OF NEW YORK, THE BAR  
ASSOCIATION OF SAN FRANCISCO, AND THE  
PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION  
AS AMICI CURIAE SUPPORTING RESPONDENTS**

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**INTEREST OF AMICI**

*Amici* are a collection of mandatory and voluntary bar associations—or sections or committees thereof—repre-

senting thousands of attorneys throughout the nation.<sup>1</sup> The membership of these groups is comprised of attorneys from every sector of the legal profession: solo practices, large and small law firms, local, state and federal governmental agencies, as well as civil rights and other public interest organizations. These members include many who have represented plaintiffs in cases brought under the civil rights laws and other fee-shifting statutes,<sup>2</sup> as well as many who have represented defendants, both private and governmental, in such cases.

In the view of *amici*, the key issue presented in this case is the one discussed by Justice Rehnquist in his opinion granting a stay of the decision below: whether, in civil rights cases, court-awarded attorneys' fees for prevailing plaintiffs must be limited so as to remain "proportional" to the damages won by these plaintiffs. 106 S.Ct. 5 (1985). *Amici* wish to bring to the Court's attention both the collective views of these bar groups on the meaning of fee-shifting statutes and the collective experience of attorneys litigating civil rights and other cases brought under such statutes.

*Amici* take the position that a rule of proportionality was never intended by Congress when it authorized fee-shifting. In addition, based on the practical realities of legal practice, we believe that such a rule would operate to discourage severely the litigation of meritorious civil rights claims. As it is, the litigation of civil rights claims is often an expensive and speculative means of producing income for plaintiffs' counsel. Too often, the difficulty of

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<sup>1</sup> The views expressed herein represent only those of Division 2—Antitrust, Trade Regulation and Consumer Affairs—of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors.

<sup>2</sup> For example, the Plaintiff Employment Lawyers Association is composed primarily of solo practitioners and members of small firms who specialize in representing individual employees in employment-related cases.

securing an award of fees discourages members of the private bar from undertaking such cases. Limiting fee awards to an amount strictly proportional to the recovery will discourage the private bar even further from entering into this field of legal practice.<sup>3</sup>

### STATEMENT

This case involves an award of attorneys' fees against the City of Riverside, California and five of its police officers, all of whom were held liable for violating the civil rights of the eight respondents. The underlying lawsuit was filed after the police officers violently disrupted a party in a private home, using tear gas and unnecessary physical force. J.A. 188. The officers engaged in this conduct despite the fact that they had no warrant, and the party was creating no disturbance. *Id.* They arrested many of those in attendance, including four of the respondents, but all criminal charges were ultimately dropped or dismissed. *Id.*

In 1980 a federal district court jury awarded respondents a total of \$33,350 in damages on various claims,<sup>4</sup> with liability distributed among the six petitioners. After the verdict, respondents filed a motion for attorneys' fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. In 1981, the district court awarded them \$245,456.25 in fees and costs. J.A. 175. This fee award was affirmed by the United States Court of Appeals for the Ninth Circuit in 1982, J.A. 176, but in 1983 this Court granted a petition for a writ of certiorari, vacated

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<sup>3</sup> The parties to this case have consented to the filing of this brief, and their letters of consent have been lodged with the Clerk.

<sup>4</sup> The original complaint alleged violations of the First, Fourth, and Fourteenth Amendments, as well as 42 U.S.C. §§ 1981, 1985(3), and 1986. It also made a variety of related state law claims, including false arrest and imprisonment, malicious prosecution and negligence. The jury ultimately found against petitioners only on the negligence, false arrest, false imprisonment, and constitutional claims.

the judgment below, and remanded the case for reconsideration in light of the decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), J.A. 184.

On remand, the district court reinstated the original fee award, seeing no basis for a reduction in (1) the fact that some other defendants were dismissed, (2) the fact that respondents did not prevail on every legal theory raised, or (3) the absolute amount of the damages. J.A. 187-92. On June 27, 1985, the Ninth Circuit again affirmed. J.A. 193. It agreed with the district court that respondents' claims all involved a common core of facts and related legal theories, so that, under *Hensley*, there was no basis for a fee reduction reflecting the fact that they won only on some of their claims. J.A. 195. It also specifically rejected the suggestion that a fee award of \$245,456.25 was *per se* unreasonable because it greatly exceeded the damage award. J.A. 196.

On August 28, 1985, the decision below was stayed by Justice Rehnquist, who expressed the view that the case presented the important question whether civil rights fee awards must be "proportional" to damage awards. 106 S. Ct. 5 (1985). This Court granted certiorari in the case on October 21, 1985. *Amici* in this brief address only the proportionality issue identified by Justice Rehnquist.

### SUMMARY OF ARGUMENT

Any rule that limits fee awards in civil rights cases to a "proportion" of the damages won would be inconsistent with the very reasons that led Congress to authorize fee-shifting in such cases. As the legislative history makes clear, the fundamental goal was to enable plaintiffs to enforce the civil rights laws even where the amount of monetary relief at stake would not otherwise make it feasible or desirable for them to do so. This goal requires fee-shifting even in damages cases because the amount of damages awarded to prevailing plaintiffs does not reflect the full societal benefits of civil rights enforce-

ment—benefits that exist independent of the extent of the concrete injury that a particular plaintiff may have suffered. See *Carey v. Piphus*, 435 U.S. 247 (1978).

A rule of proportionality would be inconsistent with the congressional goal, because it would once again rule out any civil rights case in which the particular damages at stake are outweighed by the costs of litigation. This basic principle has been recognized in numerous decisions approving fee awards that far exceed the nominal or relatively small damage awards won for plaintiffs. It is a principle that merely takes full account of the practical realities facing those who are engaged in the private practice of law. If lawyers are to view civil rights cases as comparable to other kinds of work they could perform, they must be assured compensation, when they win, for the full number of hours reasonably expended. In the absence of such assurance, whole categories of civil rights cases simply will not be brought.

To be sure, courts may properly consider the “results obtained” when they calculate civil rights fee awards. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). But this consideration must be done in relative, not absolute terms. The relevant question is whether the plaintiff’s verdict represents a substantial, or only limited, victory with respect to the basic issues raised in the complaint. The court makes this assessment for the purpose of assuring that it is not awarding fees for time spent on a portion of the plaintiff’s case that did not ultimately prove productive. There is no indication in *Hensley* or anywhere else that the factor of the “results obtained” should become an absolute ceiling on fees awarded to plaintiffs who have achieved everything that they set out to do.

Finally, in the absence of a proportionality rule, there is little danger that plaintiffs will be able to abuse the system and deliberately extract inflated fees in cases where their claim is strong but their injury is relatively



small. First, courts are charged with eliminating any compensation for lawyer time that is unnecessary or redundant. In addition, if plaintiffs prove unwilling to settle for the full relief they are reasonably entitled to, defendants themselves can cut off further fee liability by making an "offer of judgment" under Fed. R. Civ. P. 68. See *Marek v. Chesny*, 105 S. Ct. 3012 (1985). At the same time, where the merits of a case are questionable, plaintiffs themselves will have ample incentive to settle, rather than risk losing everything at a trial. And if they persist in pursuing frivolous claims, they may be ordered to pay the defendant's fees. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

## ARGUMENT

### **I. A Rule of "Proportionality" Between Damages and Fees Would Conflict with the Fundamental Purpose for which Congress Authorized Fee Awards under the Civil Rights Laws.**

In deciding whether civil rights fee awards should be limited to a proportion of damage recoveries, this Court is not required to weigh competing values. It need not, for example, decide whether the importance of civil rights enforcement outweighs the goals of lessening the caseload of the federal courts or easing the litigation burdens of public defendants. In this case, the balancing of competing considerations has already been done, by Congress. The determinations made by Congress when it enacted section 1988 and other fee-shifting provisions in the civil rights field are flatly inconsistent with any rule that would limit fee awards to some "proportion" of the damages won by civil rights plaintiffs.

A rule of proportionality, as we understand it, would put an absolute ceiling on fee awards for prevailing plaintiffs in damages cases under the civil rights laws, limiting such fees to a percentage of the damages awarded. Such a rule would presumably be based on the premise

that, in the absence of a fee-shifting provision, plaintiffs' attorneys would not bill their own clients an amount in excess of the relief obtained. *See* 106 S. Ct. at 8 (Rehnquist, J., in Chambers, staying the judgment in this case). This premise, however, is itself factually incorrect. Since it is usually difficult, at the outset of litigation, to predict the ultimate recovery, it is not at all unusual for lawyers who bill by the hour to charge an amount that far exceeds any relief won for the client.

In any event, such an analogy to the practices of lawyers in the absence of fee-shifting is meaningful only to the extent that it was contemplated by Congress when it passed section 1988. The proportionality rule proposed here has been rejected repeatedly, not only by this Court but by virtually every court that has ever examined the question,<sup>5</sup> for one very simple reason: it is flatly inconsistent with the intent of Congress. When Congress decided to authorize fee-shifting in the civil rights context, its central concern was the fact that, in many civil rights cases, there is a divergence between (1) the amount of fees that a plaintiff can and will pay, and (2) the amount that a lawyer would demand in payment before agreeing to undertake the work involved. Its response was to impose the burden of attorneys' fees on a third party—the losing defendant—and to tie the *amount* of fee awards to the only factor that will make litigation a practical possibility in every meritorious case—*i.e.*, the hours of work required to win the case, regardless of the amount of concrete relief at stake. This congressional decision cannot be squared with any rule of proportionality that would, by linking fees with damages, make it once again infeasible for persons with valid civil rights claims but relatively small potential damages to turn to the courts for redress.

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<sup>5</sup> *See* pp. 14-17 *infra*.



### A. The Intent of Congress

When Congress enacted section 1988, it authorized prevailing plaintiffs to seek a fee award in a broad range of cases brought to vindicate constitutional and civil rights.<sup>6</sup> In so doing, its main concern was to assure the financial feasibility of private civil rights enforcement. As the Senate Report on the bill put it, if "private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976) [hereinafter cited as "Senate Report"].<sup>7</sup>

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<sup>6</sup> Prior to 1976, fee-shifting was statutorily authorized under certain provisions of the 1964 Civil Rights Act, including Title VII. In section 1988, Congress remedied the "anomalous gaps in our civil rights laws," S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1 (1976), that were highlighted after this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which barred the imposition of fee-shifting in the absence of statutory authorization. It did so by authorizing fee awards in cases brought under 42 U.S.C. § 1983 and several other key civil rights statutes.

<sup>7</sup> See also *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances."); *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir. 1982) ("The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.")

It has been suggested that Congress had two other objectives as well: "penalizing obstructive litigation by civil rights defendants, and generally deterring civil rights violations." *Sanchez v. Schwartz*, 688 F.2d 503, 505 (7th Cir. 1982). Clearly, to the extent that these additional legislative purposes should be weighed in the balance, they only strengthen the argument against an arbitrary limitation on fee awards unrelated to the amount of work reasonably required to win a case. Such a limitation would encourage obstructive litigation by defendants whenever they know that a plaintiff's attorney has already worked more hours than he is likely to be paid for. See p. 25 *infra*. And it would certainly lessen the general deterrence of civil rights violations.

The need for some mechanism to help finance civil rights litigation stemmed from two inescapable realities. First, the "vast majority of the victims of civil rights violations" are not sufficiently wealthy to pay their own legal counsel. H. Rep. No. 94-1558, 94th Cong., 2d Sess. 1 (1976) [hereinafter cited as "House Report"]. Second, in many cases, the relief at issue is worth less than the cost of litigating the claim. *Id.* at 9.<sup>8</sup> As a result, in such cases, few plaintiffs would be willing to finance the case out of their own pockets. Moreover, it would not be feasible for them to rely on the traditional financing mechanism for most kinds of tort cases—the contingent fee.

To be sure, Congress had at least two other choices. First, of course, it could have funded a new cadre of governmental enforcement personnel to bring enforcement actions in those cases where private plaintiffs would not do so. But it made a conscious decision not to impose the costs of enforcement on the taxpayers. *See* Senate Report at 4 ("These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy.") It sought instead to rely on the victims of constitutional and civil rights violations to act as "private attorneys general," *id.* at 3, performing the public function of civil rights enforcement at no cost to the government.

Having opted for primary reliance on private enforcement, Congress still had a second alternative to fee-shifting: it could simply have left the costs of this enforcement on the shoulders of potential plaintiffs, and accepted the level of enforcement activity that would have re-

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<sup>8</sup> *See also* 122 Cong. Rec. 31832 (1976) (remarks of Sen. Hathaway) ("In the typical case arising under these civil rights laws, the citizen who must enforce the provisions through the courts has little or no money with which to hire a lawyer, and there is often no damage claim from which an attorney could draw his fee.")

sulted from that decision. But as we have suggested, without some form of subsidy to prevailing plaintiffs, few cases would be brought in circumstances where the likely *monetary* return is low. The private bar simply could not be relied upon to file a sufficient number of such cases on a *pro bono* basis. Congress therefore went out of its way to emphasize the appropriateness of fee awards to prevailing plaintiffs where the rights at stake are "non-pecuniary in nature." Senate Report at 6.

One important category of cases where there is no substantial monetary recovery is, of course, those where the relief sought is purely injunctive. See House Report at 9. But Congress also made it clear that fee-shifting should be available in damages cases as well. The House Report on section 1988 expressly provided that "the mere recovery of damages should not preclude the awarding of counsel fees." *Id.* at 8. Congress made this choice, despite the fact that damages alone would finance some civil rights enforcement, because it concluded that it would be inappropriate to limit such enforcement to cases where the damages are substantial enough to outweigh litigation costs. In so doing, it recognized two key facts: (1) that damages cases can play a significant role in the deterrence of civil rights violations, and (2) that the socially desirable level of deterrence is not provided if damages alone are the sole means of financing the litigation.

The utility of damages cases as a means to deter illegality is fairly clear.<sup>9</sup> But the insufficiency of damages

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<sup>9</sup> See, e.g., *McCann v. Coughlin*, 698 F.2d 112, 129 (2d Cir. 1983) ("The deterrent effect of successful § 1983 actions is wholly independent of the relief which the plaintiff seeks or is ultimately awarded . . . ."); Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L.J. 447, 451 (1978) (in the "battle to restrain official misconduct," the "private suit for civil damages" is "our most promising weapon").

To be sure, the Solicitor General does appear to suggest that damages cases produce only private, rather than public benefits.

as a means to finance civil rights litigation is a somewhat more complex matter. The basic problem with reliance on damages alone to encourage the actions of "private attorneys general" is that the amounts awarded to plaintiffs in civil rights cases do not reflect the societal importance of the rights at issue. They are calculated solely on the basis of the concrete injuries suffered by the individual plaintiff as a result of the deprivation of statutory or constitutional rights. For example, in *Carey v. Phipus*, 435 U.S. 247 (1978), this Court held that a person denied procedural due process may win damages under 42 U.S.C. § 1983 only to the extent that he can show an actual "injury" to his person or property requiring compensation.<sup>10</sup> It rejected the notion that damages may reflect the "intrinsic" value of this constitutional right. *Id.* at 254-57.<sup>11</sup> Put differently, when a plaintiff sues to redress a denial of his civil rights, his damages are calculated no differently than they would be in a case of injury caused by simple negligence.

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Brief for *Amicus* the United States at 11-12. This suggestion ignores the deterrent value of damages cases. In the area of individual police misconduct, of course, damages are the key deterrent, since injunctive relief generally is not available. See *Rizzo v. Goode*, 423 U.S. 362 (1976).

<sup>10</sup> The Court went on to note that, in certain circumstances, it may be appropriate to "presume" actual injury, at least where that is the rule in analogous common-law tort cases. *Id.* at 257-64. Such a presumption, where appropriate, of course does not alter the basic principle that damages merely compensate the plaintiff for his concrete injuries.

<sup>11</sup> See also *Doe v. District of Columbia*, 697 F.2d 1115, 1122-25 (D.C. Cir. 1983) (following *Carey v. Phipus* in an Eighth Amendment case); *Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980) (following *Carey v. Phipus* in a case involving First Amendment associational rights).

We note that a case presently on review in this Court raises issues concerning the applicability of *Carey* to certain substantive constitutional rights. *Memphis Community Schools v. Stachura*, No. 85-410 (cert. granted October 21, 1985).

In the normal tort context, such an emphasis on the actual extent of injuries incurred is considered a desirable mechanism for producing the appropriate level of private "enforcement": injurious conduct is deterred only where, and to the extent that, it causes actual harm to some other person. In the civil rights context, however, Congress plainly concluded that this level of private enforcement is not enough. It did so both because it viewed any violation of the Constitution or civil rights laws as a "wrong" in itself,<sup>12</sup> and because it saw that providing judicial redress in any such case produces benefits to society that are not reflected in damage awards. When schools, workplaces and housing are desegregated, people are given the opportunity to learn, work and live in more diverse and open environments. When people are able to speak more freely, the will of the people is more effectively represented. And when police are deterred from racially motivated harassment of citizens, the immediate physical injuries prevented may be small, but in the long run the result may be fewer urban riots and greater citizen cooperation in law enforcement. These kinds of social benefits are produced whenever civil rights are enforced, regardless of the essentially fortuitous factor of the amount of concrete injury that a given plaintiff can prove.

In sum, the central purpose of Congress's decision to authorize fee awards in damages cases was to provide sufficient compensation to allow litigation of meritorious claims even where the amount of damages to be won might not otherwise be sufficient to justify a lawsuit. In so doing, it is hardly likely that Congress simultaneously foresaw a rule for calculation of fees—proportionality—that would merely replicate the problem. After all, under the proportionality rule, it still would be financially undesirable and infeasible for plaintiffs and their lawyers

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<sup>12</sup> Congress emphasized that the acts at issue here, unlike a garden-variety instance of negligence, involved violations of the "Nation's fundamental laws." Senate Report at 2.



to bring suits in those cases where damages are outweighed by litigation costs.<sup>13</sup> Such plaintiffs and lawyers would know, in advance, that their prospective fee award simply could not cover the costs involved, and would therefore opt to do nothing.

Certainly there is no indication in the legislative history that Congress anticipated a rule under which fees would be reduced proportionally to reflect the amount of damages awarded. On the contrary, the only comment in the House and Senate reports that discusses the relation between fees and damages suggests, and then apparently rejects, the converse rule—*i.e.*, that fees should be withheld when damages get too *high*, because the need for an incentive no longer exists. House Report at 8-9.<sup>14</sup>

More fundamentally, when Congress set about describing the standards that would apply to fee awards, it re-

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<sup>13</sup> It is thus baffling that the Solicitor General would suggest that fee awards in damages cases should be limited to the amount that an attorney would receive under a traditional contingent-fee arrangement. Brief for *Amicus* the United States at 21. Such a rule would render fee-shifting statutes nugatory in damages cases, because it would only allow the prosecution of the very same cases that would be brought absent any special rule. Certainly it is untenable to suggest, as does the Solicitor General, *id.* at 22-23, that a contingent fee of \$11,000 in this case, which involved several years of discovery and nine days of trial, would have represented a fair fee, sufficient to attract competent counsel.

<sup>14</sup> The report suggests that civil rights plaintiffs who recover substantial damages should not be treated less favorably than anti-trust plaintiffs who may recover attorneys fees even after receiving *treble* damages. Nevertheless, some courts still seem to be applying a rule that is the inverse of the proportionality rule—the “bright prospects” rule under which fees may be denied “where the merits of a claim are obviously strong and would be so recognized by local counsel and where the probable damage award is high and would be so recognized by counsel.” *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir. 1982). See also *Buxton v. Patel*, 595 F.2d 1182 (9th Cir. 1979). But see *Cooper v. Singer*, 719 F.2d 1496, 1501-02 (10th Cir. 1983); *Sanchez v. Schwartz*, 688 F.2d 503, 505 (7th Cir. 1982); *Sargeant v. Sharp*, 579 F.2d 645 (1st Cir. 1978).

jected any analogy to the amount that a plaintiff would willingly pay, and drew a quite different comparison. It authorized fee awards comparable to what an *attorney* would generally demand in payment before undertaking a given amount of work. As the Senate Report accompanying section 1988 put it, "counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" Senate Report at 6 (quoting *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974)). See also *Hensley v. Eckerhart*, 461 U.S. at 433. Put differently, Congress's "basic goal" was that "attorneys should view civil rights cases as essentially equivalent to other types of work they could do, even though the monetary recoveries in such cases (and hence the funds out of which their clients would pay legal fees) would seldom be equivalent to recoveries in most private-law litigation." *Id.* at 1946 (Brennan, J., concurring in part and dissenting in part). And it pursued this goal by authorizing prevailing plaintiffs' counsel to be paid for all hours of work that are reasonably required to prevail in a particular case.<sup>15</sup>

### B. The Relevant Case Law

In view of the clarity of this legislative record, it is not surprising that the relevant judicial precedents are equally one-sided. This Court, and virtually all of the courts of appeals, have rejected the notion that the amount of damages won by a civil rights plaintiff should impose some kind of proportional ceiling on fee awards, independent of the amount of work reasonably required to win the case.

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<sup>15</sup> This standard does not, as suggested by the Solicitor General, create "windfalls" for attorneys. Brief for *Amicus* the United States at 16, 26. While fee awards sometimes exceed corresponding damage awards, they always reflect hours of actual work by attorneys. It is only the traditional contingent fee arrangement that ever produces a real "windfall." See note 19 *infra*.



First, there is a long series of cases involving the availability of fees in cases where the damages awarded are purely nominal. For example, as we have noted, in *Carey v. Piphus*, *supra*, this Court held that there may not be actual damages awarded for the "intrinsic" value of procedural due process rights, but it nevertheless held that persons denied due process may bring suit, regardless of any concrete injuries, and receive nominal damages. It based this ruling on the "importance to organized society that those rights be scrupulously observed." 435 U.S. at 266-67. In the course of this decision, the Court went out of its way to point out the critical role that section 1988 would play in allowing such a lawsuit to proceed despite the absence of substantial concrete injuries to the plaintiff. The Court stated: "We also note that the potential liability of § 1983 defendants for attorney's fees, see [§ 1988], provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights." *Id.* at 257 n.11. In sum, the Court rejected, at least implicitly, any principle of proportionality by indicating that there could be a substantial fee award—sufficient to make litigation a practical possibility—even where the damages awarded amount to one dollar. This decision has been followed by a great many courts of appeals. See *Nephew v. City of Aurora*, 766 F.2d 1464, 1466-67 (10th Cir. 1985); *McCann v. Coughlin*, 698 F.2d 112, 128-29 (2d Cir. 1983); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1220 (5th Cir. 1982); *Bonner v. Coughlin*, 657 F.2d 931, 934 (7th Cir. 1981) (*per curiam*); *Perez v. University of Puerto Rico*, 600 F.2d 1, 2 (1st Cir. 1979); *Burt v. Abel*, 585 F.2d 613, 617-18 (4th Cir. 1978).<sup>16</sup>

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<sup>16</sup> Some of these decisions do recognize that the nominal nature of the damage award is a factor to be considered in determining the size of the fee award. See *Bonner v. Coughlin*, 657 F.2d at 934; *Perez v. University of Puerto Rico*, 600 F.2d at 2. But as we discuss *infra*, giving due consideration to the amount of damages won is quite appropriate, and does not amount to the same thing as enact-

In addition, many courts have recognized the obvious corollary of the principle that nominal damages can justify substantial fees. They have held that a *small* award of actual damages does not impose an absolute limit on the fees available to the prevailing plaintiff. See *DeFilippo v. Morizio*, 759 F.2d 231, 235 (2d Cir. 1985); *Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983); *Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236, 238-39 (8th Cir. 1982); *Furtado v. Bishop*, 635 F.2d 915 (1st Cir. 1980); *Coop v. City of South Bend*, 635 F.2d 652 (7th Cir. 1980); *Walston v. School Board*, 566 F.2d 1201, 1204-05 (4th Cir. 1977).<sup>17</sup> Certainly, it would be anomalous to allow a plaintiff who wins nominal relief to receive a fully compensatory fee, while penalizing another plaintiff merely because, in his case, the constitutional violation caused some actual harm and he was therefore able to win some—albeit not a great deal—of actual damages. In each case, the problem is the same: the damages awarded do not take into account the societal importance of civil rights enforcement, and thus cannot serve as any absolute guidepost for the fee to be awarded to the plaintiff's counsel.

Finally, we note that in *Blum v. Stenson*, 104 S. Ct. 1541 (1984), this Court expressly rejected the argument that fee awards should vary depending on the *number of*

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ing a rule of proportionality. All of the cited decisions authorized *substantial* attorneys' fees in cases involving totally insubstantial damage awards.

<sup>17</sup> Indeed, the only decision we have located that endorsed a flat rule of proportionality is the decision in *Scott v. Bradley*, 455 F. Supp. 672 (E.D. Va. 1978), cited in Justice Rehnquist's stay opinion, 106 S. Ct. at 8. This decision, however, appears to be inconsistent with the governing rule in the Fourth Circuit. See *Walston, supra*; *Burt, supra*.

Petitioners rely on *Jaquette v. Black Hawk County*, 710 F.2d 455 (8th Cir. 1983), Br. at 16, but this decision plainly provides that a "modest damage award" should not "dictate the size of the attorney fee." 710 F.2d at 461.

clients who receive the benefits of a given lawsuit. *Id.* at 1549 n.16. Clearly, where the lawyer represents a large class, this fact will affect the overall amount of any monetary benefit won, but it need not affect the amount of work involved. "Presumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual." *Id.* And, since fee awards under section 1988 should depend upon the "amount of attorney time reasonably expended on the litigation," *id.*, the amount of the fee award should be unaffected. In sum, here again, the Court clearly assumed that the relevant factor is not the absolute amount of relief won, but the amount of work reasonably required to win the case for the prevailing plaintiff.

### C. Practical Considerations

As we have suggested, in authorizing fee awards to prevailing plaintiffs, Congress anticipated awards based not on what a plaintiff would willingly pay for the damages won, but on the amount that a lawyer would ask to undertake the work involved. Put differently, the key factor in setting the fee award must be the number of hours worked, not the relief produced. In making this choice, Congress was simply taking into account the practical realities that face those lawyers engaged in the private practice of law. In 1976, when section 1988 was adopted, as today, the key factor in setting the fee of lawyers in private practice was and is the number of hours worked. A 1968 study based upon a questionnaire submitted to lawyers in all 50 states by the American Bar Association concluded, "Overwhelmingly, the factor considered the most is the time spent." Roehl, "Modern Billing Techniques—1968 Survey," *Proceedings of the Third National Conference on Law Office Economics and Management* 171, 178 (ABA 1969).<sup>18</sup>

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<sup>18</sup> According to the study, 100% of the reporting firms considered time in their billing, and an average factor of 58% of the fee was

In light of this reality, it was essential for Congress, in its effort to attract lawyers to civil rights litigation, to provide for compensation on a comparable basis. While many members of the private bar do recognize an obligation to do some *pro bono* "public interest" litigation, reliance on altruism or a sense of professional obligation is not enough. If private law firms are to be attracted to civil rights litigation in a substantial way, they must at least be promised compensation for all of the hours of work that they reasonably undertake, in the event that they prevail.

We recognize, of course, that all lawyers, including those paid by the hour, do make adjustments in their bills in certain cases. And, as we discuss in the next section, there is room for some parallel "billing judgment" in civil rights cases by plaintiffs' attorneys and ultimately by courts. But it would be quite another thing to impose a draconian ceiling that is totally unrelated to the work performed by those attorneys. After all, there are already a number of other significant disincentives to entry into this field of legal practice. In civil rights cases, unlike most other types of cases, the lawyer faces the risk that he will lose his fee altogether if he loses.<sup>19</sup> More-

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determined solely on the basis of the time devoted to the resolution of the matter. By contrast, the same study reported that less than 41% of reporting firms relied upon the benefits obtained for the client in setting the fee, and then to the extent of only 18% of the fee factor. *Id.* at 177.

<sup>19</sup> To be sure, in tort litigation, a contingent fee arrangement is common. But there, the lawyer's risk of losing his fee is counterbalanced by the possibility that he may be significantly over-compensated, if a case settles early for a substantial damage award. Under a fee-shifting statute, since fees are always calculated based on the number of hours worked by the attorney, the risk of losing the fee is not counterbalanced by a chance of over-compensation. It is also worth noting that "[p]laintiffs in police misconduct suits seem *less* likely than plaintiffs in general to succeed in recovering damages." Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 789 n.37 (1979) (citing statistics).

over, he generally knows that he will receive no fee whatever until after a case is over, and even then may face years of litigation over the fee issue alone.<sup>20</sup> And he often knows that his opponent will be represented by counsel employed by a governmental entity, and thus will not face the usual financial pressures to resolve a case quickly. If these disincentives are augmented by a rule that limits fee recoveries to some percentage of damages recovered, the obvious result will be refusal by most lawyers to handle any civil rights case, except those where there is a likelihood of substantial damages—i.e., the same cases that would be brought even in the absence of any form of fee-shifting.

In practice, this would mean the nearly total exclusion of civil rights enforcement in categories of cases where damages are seldom large. One such area, for example, is housing discrimination, where damage awards in cases involving individual acts of discrimination range from a few hundred to a few thousand dollars. See Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 Harv. C.R.-C.L. L. Rev. 83, 105-20 (1981). See also *DiFilippo v. Morizio*, 759 F.2d at 235 (award of \$2250 is consistent with "fair housing damage awards generally"). Another, as *Carey v. Piphus* suggests, is the area of procedural due process, where most often the damages will either be nominal or be limited to the injury caused by a temporary and erroneous denial of a governmental benefit. Even in the area involved in this case—police misconduct—there are many cases where the actual injury inflicted is not large. See *Kerr v. Quinn*, 692 F.2d 875, 878 (2d Cir. 1982); Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 789 nn.36 & 37 (1979) (citing low average damage awards); Newman, *Suing the Lawbreakers: Proposals to Strengthen the § 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L.J. 447,

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<sup>20</sup> See, e.g., *Laffey v. Northwest Airlines*, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 3488 (1985); *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982).



465 (1978) (“[E]xcept in the rare case in which a successful plaintiff recovers a substantial award for serious injuries inflicted by excessive force, cases of illegal arrests and searches, even when successful, generally result in very modest awards.”)<sup>21</sup> In sum, if the civil rights fee-shifting provisions are to operate in a way consonant with the congressional goal of maximizing the enforcement of meritorious claims, they must be understood to allow fee awards that are not restricted by any arbitrary formula based upon the total amount of damages won.<sup>22</sup>

## II. The “Results Obtained” in a Lawsuit are Relevant to the Amount of Fees Awarded, but They Must Be Assessed in Relative, Not Absolute Terms.

In arguing against any proportional limitation on fee awards, we do not mean to suggest that the amount of damages won in a civil rights case never plays a role in the determination of the amount of fees to be assessed.

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<sup>21</sup> Judge Newman goes on to note that the injury caused by several days of erroneous custody in jail has sometimes been valued as low as \$500, while a few hours in jail has been valued as low as \$100. *Id.* (citing cases). See also *Dellums v. Powell*, 566 F.2d 167, 194-96 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) (\$7500 in damages is “totally out of proportion” to the actual harm suffered when demonstrators were wrongfully arrested and detained).

<sup>22</sup> Similar problems would arise if the proportionality rule were extended beyond the civil rights context to other areas. One example would be litigation under the Truth in Lending Act. That Act generally is limited to setting out various disclosure requirements for lenders, and applies only to relatively small consumer credit transactions. 15 U.S.C. § 1603. As a result, in any civil suit to enforce it, the amount of actual damages tends to be low. The act also provides for a statutory penalty, but it is capped at \$1,000. *Id.* § 1640(a)(2)(a)(i). It follows that fee awards under the statute, see *id.* § 1640(a)(3), can and should frequently exceed any other monetary recovery. See, e.g., *Price v. Franklin Investment Co.*, 574 F.2d 594, 598 n.5 (D.C. Cir. 1978) (citing cases). See also *West v. Capitol Federal Savings & Loan Ass’n*, 558 F.2d 977, 981 (10th Cir. 1977) (class action under the antitrust laws) (“Although the individual amounts here involved are small, . . . the attorneys are entitled to a fee award based on the legal work, not the amount of recovery.”)

On the contrary, this Court made clear in *Hensley v. Eckerhart* that the court should consider, among other factors, the “results obtained” by counsel for their clients. 461 U.S. at 430, 434.<sup>23</sup> The key, however, is to recognize precisely *how* this factor properly affects the amount of the fee award.

Nothing in *Hensley* suggests that the “results obtained” by the plaintiff should be weighed in absolute terms—*i.e.*, as a fixed limitation on the amount of fees that can be awarded. Instead, the level of success must be assessed *relative* to what the plaintiff sought in his complaint. In this sense, the factor of the “results obtained” is simply a restatement of the basic principle that fee awards are contingent on success on the merits. What the Court made clear in *Hensley* is that success on the merits is not a “yes or no” matter. Instead, a plaintiff may “prevail” only in part. If he does so, he should recover only a partial award of fees, reflective of the amount of time he spent on matters that later proved to be productive.

As the *Hensley* Court pointed out, there are two ways in which a plaintiff can achieve only partial success on the merits. First, of course, where a plaintiff has pleaded several unrelated claims and prevailed on only some of them, the court should properly exclude the hours expended working on the unsuccessful claims. 461 U.S. at 434-35.<sup>24</sup> Second, even if the complaint pleads only one

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<sup>23</sup> This holding was based on the House and Senate Reports accompanying section 1988, which expressly endorsed the analysis set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). See Senate Report at 6; House Report at 8. The Fifth Circuit's test for fee awards in *Johnson* was made up of twelve factors, including the factor of the “amount involved and results obtained.” *Id.* at 718. Thus, this citation clearly “indicates that the level of a plaintiff's success is relevant to the amount of fees to be awarded.” *Hensley*, 461 U.S. at 430.

<sup>24</sup> On the other hand, if a plaintiff pleads several different claims for relief, all of which involve the same basic facts and similar



claim or an interrelated set of claims, it is still possible for a plaintiff to "prevail" only partially. In essence, the court is charged with determining whether the plaintiff achieved "substantial relief" rather than "limited success" on his central claim. *Id.* at 440. In so doing, the court must examine the legal theories pleaded and the relief sought, and decide whether the plaintiff achieved "excellent results." *Id.* at 435. If so, he should not have his fee award reduced merely because he failed to prevail on every single legal contention raised, *id.*, or merely because he failed to win every single type of relief sought, *id.* at 435 n.11.<sup>25</sup> Where, on the other hand, the court is convinced that the plaintiff did not accomplish much of what he set out to achieve, a partial reduction in fees is required. *See id.* at 438 n.14 (a "limited fee award" is appropriate where "'minor' relief obtained").

The main point, for present purposes, is that all of these assessments involve comparisons between (1) the original theories and goals set out by the plaintiff and (2) the outcome of the case. There is no suggestion in *Hensley* that the "results obtained" is a factor that imposes an absolute limit on fees, unrelated to the degree of

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types of legal theories, he should not be penalized when he prevails on only one such claim. *Id.* at 435 ("Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.")

<sup>25</sup> It is not altogether clear, after *Hensley*, how a court should handle a situation in which a plaintiff has asked for one sum of money as damages, and only received a lesser, albeit still substantial, sum. In our view, this difference alone should not be a justification for limiting fees, except in two instances: (1) where the lower damage recovery reflects the plaintiff's failure to convince the court about a discrete *type* of injury, which required separate legal preparation, or (2) where it reflects less-than-adequate presentation of the case, *see DeFilippo v. Morizio*, 759 F.2d 231, 235 (2d Cir. 1985). In other cases, it seems both unfair and counterproductive to penalize plaintiffs and their counsel, when they have won substantial victories, merely because they failed to guess accurately the precise amount of damages they could win from a court.

the plaintiffs' success on the goals he set for himself. On the contrary, the Court went out of its way to reiterate that when plaintiffs win the results they are seeking, they should "recover a fully compensatory fee," defined in terms of the "hours reasonably expended on the litigation." *Id.* at 435. In sum, nothing in *Hensley* or any other controlling decision undermines the fundamental fact that a proportionality rule would be inconsistent with the goals Congress sought to pursue in authorizing fee awards in civil rights cases.

### III. A Rule of Proportionality is Not Needed to Prevent Abuse.

It is also worth noting that the present fee-shifting system does not create any serious potential for abuse by plaintiffs or their counsel. There would be real reason for concern if a fee-shifting rule gave plaintiffs *carte blanche* to incur unlimited fees whenever they have a strong case on the merits and thus are very likely to prevail. In such circumstances, plaintiffs could vastly augment the financial exposure of defendants who, by hypothesis, did deprive them of legal rights but may have caused very little real injury. In fact, however, there is very little danger that such abuses will occur, in light of two existing checks in the system: (1) the power of the court to exclude excessive hours, and (2) the power of the defendants to cut off further liability for fees and costs by offering to pay the full value of the injury under Fed. R. Civ. P. 68.

In arguing that the hours worked by plaintiffs' counsel should be the primary basis for a fee award, we do not mean to suggest that the hourly totals submitted provide the complete answer in every case. As Justice Rehnquist pointed out in his stay opinion in this case, the Court has recognized the possibility of downward, and upward, adjustments in the "lodestar" hourly figure. 106 S. Ct. at 8 (citing *Hensley* and *Blum v. Stenson*, 104 S. Ct. 1541

(1984)). One example of an appropriate judicial adjustment is the situation just discussed—where the court is convinced that the plaintiff only partially prevailed. But even where the victory is complete, the court may still conclude that counsel are seeking compensation for hours of work that were “excessive, redundant, or otherwise unnecessary.” *Hensley*, 461 U.S. at 434. In such a situation, this Court has already made clear that courts should exercise their own “billing judgment” and reduce the fee to an amount that reflects the hours *reasonably* expended in the case. This power to adjust the fee award represents a useful potential check on any attempt by a plaintiff’s lawyer with a small but strong civil rights case to “pad the bill.”

A related problem would arise if a plaintiff’s lawyer were to insist upon *proving* his case—in order to maximize the fee recovery—despite the defendant’s willingness to settle for a reasonable damage payment early on in the process. This is a problem that defendants can deal with themselves. As this Court made clear last Term in *Marek v. Chesny*, 105 S. Ct. 3012 (1985), Rule 68 of the Federal Rules of Civil Procedure provides a potent means of defusing any distortion in the settlement process that may result from the desire of a plaintiff’s lawyer to litigate fully a small but meritorious case. If (1) the defendant makes a valid “offer of judgment” under this rule, (2) it is declined by the plaintiff, and (3) the plaintiff ultimately recovers less than the offer, then the plaintiff cannot recover any fees or costs incurred after the date of the offer. In sum, by incorporating a settlement offer in a Rule 68 offer of judgment, defendants can effectively forestall further fee liability.<sup>26</sup>

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<sup>26</sup> To be sure, some defendants may refuse to make such an offer, even where their ultimate liability is fairly clear, because they are unwilling to admit voluntarily to a violation of the Constitution or the civil rights laws. But this potential psychological factor—the unwillingness of defendants to settle where financial considerations

Such settlement offers will not always occur, of course, where the ultimate liability of the defendants is less clear. But in such a case, it is the self-interest of the plaintiff and his attorney that comes to the fore and helps to promote settlement. A plaintiff with a questionable case has every reason to seek a reasonable settlement rather than risk winning nothing at trial. And his attorney has the same basic set of incentives. Because he wins no fees if he fails to prevail on the merits, he too is far less likely in a questionable case to prefer drawn-out litigation to a reasonable settlement. Finally, if a plaintiff persists in pursuing a frivolous case, he himself may be liable for the attorneys' fees of the defendant. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

In contrast to these various safeguards in the present system, under a proportionality rule a plaintiff would have no way to prevent a defendant from extracting an unfair advantage by refusing to settle a clearly losing case. As suggested above, defendants' counsel are very often paid by public funds and thus could easily drag matters out in such a case until they knew that the hours worked by the plaintiff's attorney had gone well beyond any likely fee recovery under the proportionality rule. In so doing, defendants could use the rule as an effective means of punishing, and deterring, those lawyers in the community who have exhibited a willingness to take on meritorious civil rights cases in reliance on the fee-shifting authorized in section 1988.

For all of these reasons, we submit that the practical effect of the present system is not to open the door to significant abuses, but to prevent abuses. With a fee-shifting rule that does not limit fees to a proportion of

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so dictate—does not argue for some arbitrary proportional limitation on plaintiffs' fee awards. To the contrary, this unwillingness is one of the potential barriers faced by plaintiffs in civil rights cases which requires and justifies full fee awards.

damages, many more civil rights cases are brought. But that is exactly what Congress intended. When these cases are brought, the court and the defendants have ample means to combat the risk of "overly zealous" litigation by plaintiffs. And plaintiffs themselves, in most cases, have adequate incentive to resolve cases rather than continuing with unnecessary court battles.

### CONCLUSION

For these reasons, the decision below should not be reversed on the basis of any perceived disproportionality between the damages won and the fees awarded.

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